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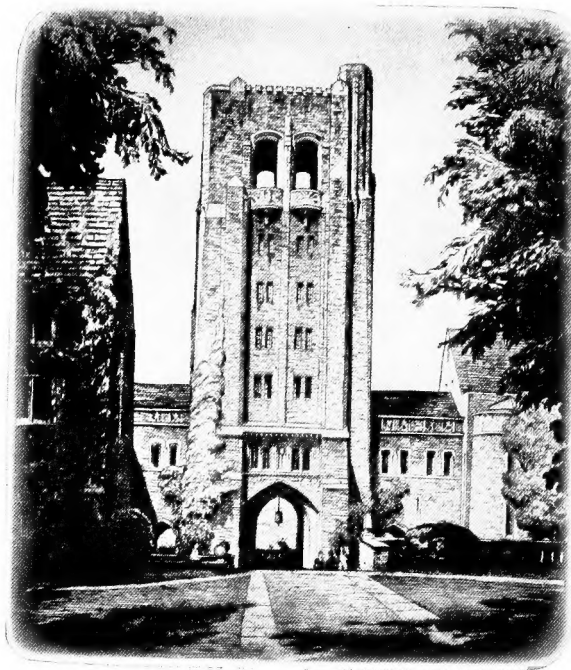
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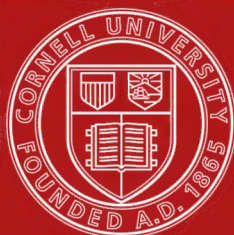
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# CASES ON PLEADING

BY

JAMES TOWER KEEN

INSTRUCTOR OF LAW AT BOSTON UNIVERSITY

"And know thou my sonne, that I will not that thou beleewe, that all that I have said in the said Bookes is Law, for that I will not take upon me nor presume: But of those things that be not law, inquire and learne of my wise Masters learned in the law."

— *The Epilogue to Littleton's Tenures.*

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To  
LESLIE MELVILLE BIGELOW,  
HARVARD, A.B., 1895,  
SON OF MELVILLE MADISON BIGELOW.

~~He~~ was a young man of great promise.





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## INTRODUCTION

THIS work stands upon three foundation stones. First, the relationship between modern remedial and ancient remedial law. Second, the relationship between modern substantive and ancient remedial law. Third, the relationship between modern social and financial conditions and ancient remedial law.

First, of the connection between special pleading and the pleading of to-day. They cannot be separated. The very statutes which seek to abrogate common-law pleading use its terms; and how can one understand a statute without knowing what the words of the statute mean? And in doubtful cases of interpretation of statutory words, where shall one turn for light but to the place—the only place—where the words have been made clear—to the common law? Speaking of the present law of Massachusetts, Chapman, J., said, “And though it [the Practice Act] changes the forms of pleading and dispenses with technicalities, it is still important in framing declarations and answers, so as to present causes properly for trial, that the principles of special pleading should be carefully regarded.”<sup>1</sup> With reference to the present law in States which have supplanted common-law pleading by codes of civil procedure, one writer declares, “It is no longer pretended that the knowledge of common-law pleading is rendered useless by the code, but that the same fundamental principles underlie both systems.”<sup>2</sup> And another, “It is assumed that the student of the code is familiar with the common-law and equity systems of pleadings. If not, he is groping in the dark, and much that is offered will escape his apprehension. This knowledge is deemed essential, not only because well-educated lawyers must know the history of our jurisprudence; must live through it, as it were, and measure every step of its marvellous progress, but because the foundation idea of pleadings is not changed.”<sup>3</sup> It follows, then, that a knowledge

<sup>1</sup> *Read v. Smith*, 1 Allen, 519, at 521.

<sup>2</sup> Andrews in his introduction to *Stephen, Pleading*, 23.

<sup>3</sup> Bliss, *Code Pleading* (2d ed.), § 141.



of common-law procedure is useful to the busy, practising lawyer, because it enables him to draw accurate pleadings. We shall study with that end in view.

Second, of the connection between special pleading and modern substantive law. Mr. Justice Holmes declares that, "Whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source."<sup>1</sup> Pollock and Maitland write, "Those few men who were gathered at Westminster round Pateshull and Raleigh and Bracton were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean; they were making right and wrong for us and for our children."<sup>2</sup> To make right and wrong is to make substantive law, and the passage might well read, "were making *substantive law* for us and for our children." In the following pages, we shall plod step by step through the history of the several actions: we shall note the origin and evolution of each; we shall deal minutely with the definition and characteristics of each; and then, taking the whole scheme of common-law actions as a basis, we shall determine why it was and is that substantive rights went unvindicated and still go unvindicated; and substantive wrongs went unredressed and still go unredressed. We believe that the answer to the question is this: Because the writs which "the few men who were gathered at Westminster round Pateshull and Raleigh and Bracton were penning;" writs which were to "run in the name of kingless commonwealths on the other shore of the Atlantic Ocean;" writs sufficient only for the day of Pateshull, Raleigh, and Bracton, became rigid boundaries to actions; and though substantive law might expand, remedial law would not expand. It is usual to speak of the perpetuated procedure of the ancients as worthy of the deepest veneration. We can only compare it with a cage in which the infant substantive law was put to live: the substantive law grew, and outgrew the bounds of its cage, but the bars would not yield; and the result was a deformed, misshapen thing, which, unsupplemented by equity and statute, would make justice a laughing-stock. We must, then, trace the effect of remedial upon substantive law with greatest care.

Third, of the connection between special pleading and modern social and financial conditions. If rules of procedure formulated

<sup>1</sup> Holmes, *Common Law*, 253.

<sup>2</sup> Pollock and Maitland, 670.

in the days of broadsword and armor, of post-chaise and Robin Hood, have wrought limitations upon modern substantive law, *a fortiori*, they have wrought limitations upon all intercourse between men and men. In a recent letter to Dr. Vinogradoff, the successor at Oxford of Sir Henry Maine and Sir Frederick Pollock, Dean Melville M. Bigelow says, "But is law as we have it what we now require? Can the conditions of primitive times, or of much later times even down to the nineteenth century, serve this age of electricity — the twentieth century? Some of us are convinced that they cannot. They long since became the subjects of purely or largely *a priori* rules of law; and we in America at least are feeling the pinch of them. They are fettering in a most serious way natural and reasonable pursuits. The criminal law, for instance, is breaking down, or rather is trying, rightly, I think, to burst its fetters: it is calling on equity, which used to say it had nothing to do with criminal law, to come to its aid. [For example, injunctions against unlawful picketing in strikes arising out of labor troubles.]

"Our Scientific School — we are just starting it in this Law School — sets out with the idea that the law, so far as business and pursuits generally are concerned, should be, not a cause but an effect of relations: in other words, as Lord Bowen once put it in a serious talk with me, *law should follow business or pursuits*, and not seek to press them this way or that in advance.

"That, we think, is the true idea — the true scientific method. History may and will help — so will the Analytic Method: but both of these will fall vastly short of furnishing safe guides in the new conditions which confront us to-day. Our theory — I mean the theory of Boston University Law School — is that we should study and master, so far as possible, the present needs of business intercourse, and that the law should obediently follow, so long as nobody's rights are invaded and the welfare of the State is not assailed. With us, over here, business is *demanding* that this shall be done, and that the fetters of mediævalism shall be cast aside. It seems to me that the demand is right, and it seems equally clear that it must be heeded."

For every petitioner in equity who fails because he has a complete and adequate remedy at law; every plaintiff who fails because he should have brought, say, case instead of trespass, or an action *ex delicto* instead of *ex contractu*; every defendant who fails because under his plea he is precluded from introducing evi-

dence which the substantive law would make a defence ; briefly, in every case where a litigant fails because he has misconceived his pleading, substantive law is defeated by procedural technicalities and injustice is wrought. This both at common law, and under practice acts based upon the common law.

An expression of gratitude is called for to my masters in the history of procedure. To Sir Frederick Pollock, and to Mr. F. W. Maitland, of England, to James Barr Ames, Oliver Wendell Holmes, James Bradley Thayer, and Melville Madison Bigelow of America, the profession owes a debt greater even than the debt it owes to Austin, Maine, and Reeves. More could not be said. They have made the history and procedure of the English law their own.

To Mr. Owen D. Young, former Instructor in Pleading at Boston University, the editor is indebted for inestimable help in the character of the present work. Especially is he under obligation to Melville M. Bigelow, by whose teaching his thought has been moulded, and whom he must thank for whatever slight degree of success he may ever attain.

Valuable editorial assistance has been rendered by Arthur P. Gay of the Boston bar.

JAMES TOWER KEEN.

BOSTON UNIVERSITY LAW SCHOOL,  
August 1, 1904.



## PLAN OF THE BOOK.

THIS work proceeds upon the theory that the chief value of the study of common-law pleading is not in its worth as a course in legal logic, but rather in its usefulness as a science inseparably joined to living law. With this in view, the origin and evolution of each of the several actions have been carefully traced, and the characteristics of those actions in developed law have been dwelt upon at length.

The plan may be briefly stated. First is presented in bold type a brief statement by the editor of the vital characteristics of the action or pleading to be studied. Second, there are given, in much smaller type, precedents of the very pleadings themselves, chosen from classic pens. Third, cases are reported in ordinary type which illumine the action or the pleading discussed. Notes are prefixed to the cases, but these notes merely indicate the issues decided, and in no degree enable the student to abstain from a searching study of the principles involved.

The relation between special pleading and pleading under codes and practice acts has been briefly sketched. If it is true that, although the codes have abolished all distinction between the mere forms of actions, there are yet intrinsic differences between them which no law can abolish, students of code pleading may find the book of some use. The determination of what limitations have been wrought upon present substantive law by the survival of archaic rules of procedure is necessarily left to inference; but it is believed that, upon thoughtful reading of the cases, these limitations will plainly appear.



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# CASES ON COMMON-LAW PLEADING

## IN CIVIL ACTIONS.

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### PART I.—PERSONAL ACTIONS.

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#### CHAPTER I.

##### ORIGINAL WRITS AND PROCESS.

*A is to sue B. What must A do?*

THE purpose of the present work is to trace the steps in a suit at common law ; the purpose of the present chapter, to show how such a suit was begun. The three great courts of England were the King's Bench, the Court of Common Pleas, and the Exchequer. Originally, the jurisdiction of the King's Bench was limited, even on the civil side of the court, to wrongs committed *vi et armis* or *contra pacem*, i. e. criminal in nature, but furnishing a cause of civil action. Hence actions on contracts, or for recovering one's goods not wrongfully taken, were not for this court. They lacked the vital element of crime. The Court of Exchequer, in its origin, concerned itself only with cases where the defendant was deforcing the crown of its revenue, its jurisdiction therefore being miserably narrow ; it guarded king's gold, not subject's gold. The Court of Common Pleas alone in early times exercised original jurisdiction in all civil actions whatever between subject and subject. Years went on, and the time finally came when both the Court of King's Bench and the Court of Exchequer grew to have jurisdiction of all personal actions between subject and subject. How this occurred, may be gathered from the following pages.

Each court, in history, had its characteristic process.<sup>1</sup> That of the Common Pleas was the original writ. In theory of Anglo Norman law, the king was the fountain of all justice. The original writ was the conduit pipe necessary to transfer jurisdiction from the king to the court, — his warrant for the judges to proceed in a given case. “It expressed the king’s sole right over the dispensation of justice, a right which the king exercised on his own terms until Magna Charta was extorted from John.”<sup>2</sup>

But in the Court of King’s Bench, where anciently the king himself sat, where later his own judges sat, there was no need for an original writ to give the court cognizance of any misdemeanor in the county where the court was. The court acted by process of its own, called a bill of Middlesex.<sup>3</sup>

In the Exchequer, since the king was always plaintiff, calling upon his debtors to pay, there was, of course, no original writ. In the development of the Exchequer, its characteristic process became the writ of *quo minus*.

Hence A., who is to sue B., must adapt his *action* to the proper court, and choose the proper *process*.

And first, what is an action?

“Nota, there be two kind of actions, viz. one that concern the pleas of the crowne, *placita coronæ*, or *placita criminalia*; another that concern common pleas, *placita communia, seu civilia*. Of that which concerneth pleas of the crowne, Littleton speaketh hereafter in this chapter. Of actions concerning common pleas, Littleton speaketh in this place. And these are threefold (that is to say), reall, personall, and mixt. *Placitorum aliud personale, aliud reale, aliud mixtum*. Or, *Actionum quædam sunt in rem quædam in personam, et quædam mixtæ*.

“And generally, *actio* is defined, *Actio nihil aliud est quam jus prosequendi in iudicio quod sibi debetur*. Or, *Action n’est autre chose que loyall demande de son droit*.”<sup>4</sup>

<sup>1</sup> To what extent the original writs, in later times, prevailed in the King’s Bench and the Exchequer will hereinafter appear.

<sup>2</sup> Big. Hist. Proc. 199.

<sup>3</sup> Because the court usually sat in the County of Middlesex.

<sup>4</sup> Co. Litt. 285 a.



"The most natural and perspicuous way of considering the subject before us will be (I apprehend) to pursue it in the order and method wherein the proceedings themselves follow each other, rather than to distract and subdivide it by any more logical analysis. The general, therefore, and orderly parts of a suit are these: 1. The original writ; 2. The process; 3. The pleadings; 4. The issue or demurrer; 5. The trial; 6. The judgment and its incidents; 7. The proceeding in nature of appeals; 8. The execution."<sup>1</sup>

## I.

## AN ORIGINAL WRIT.

A WRIT OF RIGHT PATENT.<sup>2</sup>

"Charles, etc. to T. M. greeting: We command you, that without delay you do full right to T. B. of one messuage and ten acres of land with the appurtenances in B. which he claims to hold of you by the free service of one penney per annum for all service; of which J. S. deforceth him; and unless you will do this, let the sheriff of C. do it, that we may hear no more clamor thereupon for want of right.

"Witness, etc."

*Reg. f. 1 a.*

"First, then, of the original, or original writ; which is the beginning or foundation of the suit. When a person hath received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider with himself, or take advice, what redress the law has given for that injury; and thereupon is to make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. As, for money due on bond, an action of debt; for goods detained without force, an action of detinue or trover; or if taken with force, an action of trespass *vi et armis*; or to try the title of lands, a writ of entry or an action of trespass in ejectment; or for any consequential injury received, a special action on the case. To this end he is to sue out, or purchase by paying the stated fees, an original, or original writ, from the court of chancery, which is the *officina justitiæ*, the shop or mint of justice, wherein all the king's writs are framed. It is a mandatory letter from the king, in parchment, sealed with his great seal, and directed to the sheriff of the county wherein the injury is committed, or supposed so to be, requiring him to command the wrong doer or party accused either to do justice to the complainant, or else to appear in court and answer the accusation against him. Whatever the sheriff does in pursu-

<sup>1</sup> Blackstone's Com. 272.

<sup>2</sup> Booth R. Ac. 88.

ance of this writ, he must return or certify to the court of common pleas, together with the writ itself; which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause. For it was a maxim introduced by the Normans, that there should be no proceedings in common pleas before the king's justices without his original writ; because they held it unfit that those justices, being only the substitutes of the crown, should take cognizance of any thing but what was thus expressly referred to their judgment. However, in small actions below the value of forty shillings, which are brought in the court baron or county court, no royal writ is necessary; but the foundation of such suits continues to be (as in the times of the Saxons) not by original writ, but by plaint; that is by a private memorial tendered in open court to the judge, wherein the party injured sets forth his cause of action; and the judge is bound of common right to administer justice therein, without any special mandate from the king. Now, indeed, even the royal writs are held to be demandable of common right, on paying the usual fees; for any delay in the granting of them, or setting an unusual and exorbitant price upon them, would be a breach of Magna Carta, c. 29, '*nulli vendemus, nulli negabimus aut differemus, justitiam vel rectum.*'"<sup>1</sup>

### BILL OF MIDDLESEX AND LATITAT THEREUPON IN THE COURT OF KING'S BENCH.

PRESENTED 3 BLACKSTONE'S COMMENTARIES, 362 (APP.).

Middlesex, } The sheriff is commanded that he take Charles Long,  
to wit. } late of Burford in the County of Oxford, if he may be  
found in his bailiwick, and him safely keep, so that he may have his  
body before the Lord the King at Westminster, on Wednesday next  
after fifteen days of Easter, to answer William Burton, gentleman, of  
a plea of trespass, [and also to a bill of the said William against the  
aforesaid Charles, for two hundred pounds of debt, according to the  
custom of the court of the said Lord the King, before the King himself  
to be exhibited;] and that he have there then this precept.

The within-named Charles Long is not found in my bailiwick.

George the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Berkshire, greeting. Whereas we lately commanded our sheriff of Middlesex that he should take Charles Long, late of Burford, in the county of Oxford, if he might be found in his bailiwick, and him safely keep, so that he might be before us at Westminster, at a certain day

<sup>1</sup> 3 Blackstone's Com. 272.

now past, to answer unto William Burton, gentleman, of a plea of trespass; [and also to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of our court, before us to be exhibited;] and our said sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick; whereupon on the behalf of the aforesaid William, in our court before us, it is sufficiently attested that the aforesaid Charles lurks and runs about in your county: therefore we command you that you take him, if he may be found in your bailiwick, and him safely keep, so that you may have his body before us at Westminster on Tuesday next after five weeks of Easter, to answer the aforesaid William of the plea [and bill] aforesaid; and have you there then this writ. Witness, Sir Dudley Ryder, Knight, at Westminster, the eighteenth day of April, in the twenty-eighth year of our reign.

By virtue of this writ to me directed, I have taken the body of the within named Charles Long, which I have ready at the day and place within contained, according as by this writ it is commanded me.

“In the king’s bench they may also (and frequently do) proceed in certain causes, particularly of actions of ejectment and trespass, by original writ, with attachment and *capias* thereon; returnable, not at Westminster, where the common pleas are now fixed in consequence of Magna Carta, but ‘*ubicunque fuerimus in Anglia,*’ wheresoever the king shall then be in England; the king’s bench being removable into any part of England at the pleasure and discretion of the crown.

“But the more usual method of proceeding therein is without any original, but by a peculiar species of process entitled a bill of Middlesex: and therefore so entitled, because the court now sits in that county; for if it sat in Kent, it would then be a bill of Kent. For though, as the justices of this court have, by its fundamental constitution, power to determine all offences and trespasses by the common law and custom of the realm, it needed no original writ from the crown to give it cognizance of any misdemeanour in the county wherein it resides; yet, as by the court’s coming into any county it immediately superseded the ordinary administration of justice by the general commissions of eyre and of oyer and terminer, a process of its own became necessary within the county where it sat, to bring in such persons as were accused of committing any forcible injury.

“The bill of Middlesex (which was formerly always founded on a plaint of trespass *quare clausum fregit*, entered on the records of the court) is a kind of *capias*, directed to the sheriff of that county, and

commanding him to take the defendant and have him before our lord the king at Westminster on a day prefixed, to answer to the plaintiff of a plea of trespass.

“For this accusation of trespass it is, that gives the court of king’s bench jurisdiction in other civil causes, as was formerly observed; since when once the defendant is taken into custody of the marshal, or prison keeper of this court, for the supposed trespass, he being then a prisoner of this court, may here be prosecuted for any other species of injury. Yet, in order to found this jurisdiction, it is not necessary that the defendant be actually the marshal’s prisoner; for, as soon as he appears, or puts in bail, to the process, he is deemed by so doing to be in such custody of the marshal as will give the court a jurisdiction to proceed. And upon these accounts, in the bill or process a complaint of trespass is always suggested, whatever else may be the real cause of action.

“This bill of Middlesex must be served on the defendant by the sheriff, if he finds him in that county; but, if he returns ‘*non est inventus*,’ then there issues out a writ of *latitat* to the sheriff of another county, as Berks; which is similar to the *testatum capias* in the common pleas, and recites the bill of Middlesex and the proceedings thereon, and that it is testified that the defendant ‘*latitat et discurrit*,’ lurks and wanders about in Berks; and therefore commands the sheriff to take him, and have his body in court on the day of the return. But, as in the common pleas, the *testatum capias* may be sued out upon only a supposed, and not an actual, preceding capias; so in the king’s bench a *latitat* is usually sued out upon only a supposed, and not an actual, bill of Middlesex. So that, in fact, a *latitat* may be called the first process in the court of king’s bench, as the *testatum capias* is in the court of common pleas. Yet, as in the common pleas, if the defendant lives in the county wherein the action is laid, a common capias suffices; so in the king’s bench likewise, if he lives in Middlesex, the process must still be by bill of Middlesex only.”<sup>1</sup>

## WRIT OF QUO MINUS IN THE EXCHEQUER.

PRESENTED 3 BLACKSTONE’S COMMENTARIES, 363 (APP.).

George the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Berkshire, greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same, and take Charles Long, late of Burford, in the county of Oxford, gentleman,

<sup>1</sup> 3 Blackstone’s Com. 285.

wheresoever he shall be found in your bailiwick, and him safely keep, so that you may have his body before the Barons of our Exchequer at Westminster on the morrow of the Holy Trinity, to answer William Burton, our debtor of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, whereby he is the less able to satisfy us the debts which he owes us at our said Exchequer, as he saith that he can reasonably show that the same he ought to render: and have you there this writ. Witness, Sir Thomas Parker, Knight, at Westminster, the sixth day of May, in the twenty-eighth year of our reign.

By virtue of this writ to me directed, I have taken the body of the within named Charles Long, which I have ready before the barons within written, according as within it is commanded me.

“In the exchequer the first process is by writ of *quo minus*, in order to give the court a jurisdiction over pleas between party and party. In which writ the plaintiff is alleged to be the king's farmer or debtor, and that the defendant hath done him the injury complained of; *quo minus sufficiens existit*, by which he is the less able to pay the king his rent, or debt. And upon this the defendant may be arrested as upon a *capias* from the common pleas.”<sup>1</sup>

In the Exchequer an action may also be commenced by a *venire facias ad respondendum*, which is in the nature of an original writ, and is the process used in this court against peers and members of the house of commons. On this writ the defendant is summoned; and if he do not appear, a *distringas* issues, and after that, if necessary, an *alias*, *pluries*, or *testatum distringas*. Tidd's Practice, 67. An action by an attorney or officer of this court is commenced by a *capias* of privilege, and against attorneys, officers, or prisoners by bill. Ibid. 68. Archbold. [3 Blackstone's Com. 286 n.]

So much for an abstract knowledge of original writs. But how were such writs procured?

*A. has told X, his attorney, the facts of his case. X. wishes to sue out an original writ. What shall he do?*

“The original writ is issued by the cursitor [an officer of the Court of Chancery] who is so called from the writs *de curso*; [i. e. the formed writs]; and where no *capias* [arrest process] lies, as against peers or members of the house of commons, or against corporations or hundredors on the statutes of hue and cry, etc. it is necessarily the first proceeding in the cause. And where a *capias* lies, but the defendant absconds, or keeps out of the way, so that

<sup>1</sup> 3 Blackstone's Com. 286.

he cannot be arrested, or served with process against his person, it is usual to sue out an original writ, as a foundation of process against his goods, or in order to proceed to outlawry. But in all other cases, the practice is for the plaintiff's attorney to make out a præcipe for an original writ, and deliver it to the filazer, who thereupon issues the capias in the first instance, keeping the præcipe as instructions for the original [writ], which is not in fact issued, unless it becomes necessary, in consequence of a writ of error, upon a judgment by default." Tidd's Practice, 96.

Briefly, the original writ was procured by the plaintiff's lawyer from the cursitor upon a præcipe, the præcipe being a note of instructions as to the writ which the plaintiff's lawyer gave to the cursitor. For issue of process subsequent to the original writ, the attorney had to go to another officer, the filazer. The comparative importance of the præcipe and the writ are well illustrated by the following case.

### OGLETHORP *v.* MAUD.

REPORTED HOBART, 128 *a.*

In assize between Oglethorp and Maud, the writ was *ad faciendum recognitionem illum*, which should have been *illam*, and it was moved to have been amended, and Harrison the Cursitor was called into the Court, who made oath, that a note produced by him in court (which was right) was the original note, whereby the writ was made, yet because in Pennington's Assize, 11 Hen. VII., the like fault in the writ would not be amended, the Court would be advised. [As to amendment of writs, see page 9, n.]

### THE PROCESS.

*B., ordered by original writ to come into court to answer to A.'s suit, refuses. What can A. do?*

"We have now to speak of the various processes which the law employs in order to compel men to come before its courts. They vary in stringency from the polite summons to the decree of outlawry. . . . The original writ itself will indicate the first step that is to be taken, in other words, the original process." But suppose the defendant is obstinate, and will not come into court? Then "the subsequent steps (the 'mesne process') . . . will be ordered by 'judicial' writs which the justices issue from time to time as defaults are committed."

"Our readers would soon be wearied if we discoursed of mesne process. Its one general characteristic is its tedious forbearance. Very slowly it turns the screw which brings pressure to bear upon the defendant. Every default [i. e. failure to appear as commanded] that is not essoined [i. e. excused] is cause for an amercement, but the law is reluctant to strike a decisive blow. If we would understand its patience, we must transport ourselves into an age when steam and electricity had not become ministers of the law, when roads were bad and when no litigant could appoint an attorney until he had appeared in court. Law must be slow that it may be fair. . . ."

"When there was no specific thing that could be seized and adjudged to the plaintiff, as being the very thing that he demanded, the law had at its command various engines for compelling the appearance of the defendant. Bracton has drawn up a scheme which in his eyes is or should be the normal process of compulsion; but we can see both from his own text and the plea rolls that he is aiming at generality and simplicity, and also that some questions are still open. The scheme is this: (1) Summons, (2) Attachment by pledges, (3) Attachment by better pledges, (4) Habeas corpus, (5) A distrain by all goods and chattels, which however consists in the mere ceremony of taking them into the king's hand; (6) A distrain by all goods and chattels, such as to prevent the defendant from meddling with them; (7) A distrain by all goods and chattels which will mean a real seizure of them by the sheriff, who will become answerable for the proceeds (issues, *exitues*) to the king; (8) Exaction and outlawry." 2 Pollock and Maitland, 576, 589, 591, of Process in Bracton's Day.<sup>1</sup>

<sup>1</sup> "A little later this Habeas Corpus seems to disappear, but the writ of Distress commands the sheriff *quod distringat, etc., et habeat corpus*, see, e. g., Northumberland Assize rolls, pp. 51, 59, 60, 178, 199, etc. Then Stat. Marl. c. 12, and Stat. West. 1, c. 45, accelerated the procedure by cutting away all that intervened between First Attachment and Grand Distress. Thus we pass to the process described by Britton, 1, 125-134. Bracton's scheme does not provide for any 'imprisonment upon mesne process'; the sheriff is not directed, as he is by the later *Capias*, to take the defendant's body and keep it safely; but the Habeas Corpus would, we suppose, justify the sheriff in arresting the defendant when the court day was approaching in order to bring him into court." 2 P. and M., 591. So much for the cumbersome mesne process,—a process that even in later times brought almost disgrace upon English remedial law. See Tidd's Practice, c. 9-13.

AMENDMENT OF WRITS. *Per Cur.* in *King v. Bishop of Carlisle*, Barnes, 9. "The doctrine of amendment of original writs, by Stat. 8 H. VI., is settled in the books. 1st. No amendment of an original writ can be made, unless for uescience or misprision of the clerk. 2. There must be something to amend by." *Impey*, Common Pleas, 443.

## CHAPTER II.

### ACTIONS BEFORE THE STATUTE OF WESTMINSTER II.

ENACTED 13 EDWARD I. C. 24.

THE introductory note to the first chapter hints that even personal actions are of several kinds. Actions for wrongs committed *vi et armis*, i. e., criminal in nature but civil in remedy, were seen to be peculiarly adapted in early times to the Court of King's Bench; while actions for recovering one's goods not taken *vi et armis* were not to be brought there. The natural conclusion is that rights or wrongs arising from certain sets of facts were to be vindicated or remedied, as the case might be, by specific actions applicable to specific sets of facts. Thus: A. strikes B., inflicting damage; A., with force and wrongfully, carries off from the possession of B. his chattel, and thus inflicts damage; A. rightfully acquires B.'s chattel, as bailee for a year and a day, and wrongfully but peaceably retains possession beyond the bailment period, and thus by the deprivation inflicts damage. In each case B. will have an action, but since the actions are on fundamentally different species of facts the actions will be different. We shall later see why the remedy in the first case is called trespass *vi et armis*; why the remedy in the second case is called trespass *de bonis asportatis*; and why the remedy in the third case is called detinue. The present chapter, then, deals with the several actions, or rather, with a group of them historically classified.

"So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through its envelope of technical forms." Maine, *Early Law and Custom*, 389.



"These forms [in the time of Edward I.] had ceased to be adequate. Thus there were many cases that did not fall within the definition of a trespass, but for which it was proper that a remedy should be furnished. In order to furnish a remedy, the first thing to be done was to furnish a writ." Holmes, Common Law, 274.

"The metaphor which likens the chancery to a shop is trite; we will liken it to an armory. It contains every weapon of medieval warfare from the two handed sword to the poniard. The man who has a quarrel with his neighbor comes thither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of the combat, and also that every weapon has its proper use and may be put to none other. If he selects a sword, he must know the rules of sword play; he must not try to use his crossbow as a mace. To drop metaphor, our plaintiff is not merely choosing a writ; he is choosing an action, and every action has its own rules." 2 P. and M. 559.

## SECTION I.

### DEBT.

Probably the oldest personal action is debt. We shall show how debt traces its origin to ancient writs savoring of the feudal system in England (land writs, real writs) and how later from these there was evolved the writ of debt for money loaned. We shall examine the scope of the action in the reign of King Edward I., 1272-1307, and note in what classes of cases it lay. We shall see that the key note of debt in its early history was the recovery of a specific chattel, or of a certain quantity of a chattel (like wheat or malt) not in its nature specific, or of a certain sum of money. The latter marks it to-day.

### THE HISTORY OF DEBT.

REPORTED Y. B. 12 EDWARD IV. 9, PL. 22.

Per Brian, C. J. "If I bring cloth to a tailor to have a cloak made, if the price is not ascertained beforehand that I shall pay for the work, he shall not have an action against me."

#### (a) *Origin and Early History.*

"The history of the modern writ [of debt] may be thus summarized: 1. A period in which the precept was form-

less, unsettled material. This was coming to an end in the time of Henry the First. 2. Then a period tending to distinct settlement of form, during which there is little difference between a writ for the non-performance of services due by reason of tenure and a writ for the non-payment of money loaned. 3. The time of Glanvill's treatise, when each of these writs assumes definite form and becomes *de cursu*; the writ for money loaned being the parent of the modern writ of debt." Bigelow, History of Procedure, 165.

Writ of the year 1106, reign of Henry I., directed by the king to Gotselin de Riparia, warning him to perform engagements of tenure on pain of distraint.

"*Præcipio ut faciatis Faritio abbati de Abbendona tale servitium de feudo quod de eo et de abbazia sua tenes, quale fratris tui fecerunt antecessori suo A.*" (Athelelm, predecessor of Faritius.)<sup>1</sup> *Quod nisi feciritis, ipse abbas inde te constringat per feudum tuum.*

[I command that you do to Faritius abbot of Abingdon such service for the feud which you hold of him and of his abbey, as the ancestors of your brother did to his predecessor. Unless you shall do this, let the abbot himself compel you thence by your feud.]

Writ of the year 1110, reign of Henry I., granted by Roger, Bishop of Salisbury, the king's treasurer and justiciar, against two tenants of the church of Abingdon, jointly sued for money-debt by express contract of tenure.

"*Præcipio vobis quod reddatis ecclesiæ de Abbendona rectitudines, quas illi debetis de ecclesia vestra Kingstuna. Et nisi feceritis, Ilbertus decanus interdicat divinum officium apud Kingstuna.*"<sup>2</sup>

[I command you that you render unto the church of Abingdon the obligations which you owe it on behalf of the church of Kingston. And unless you shall do it, let Ilbert the dean forbid divine service at Kingston.]

Writ of the time of Glanvill, Justiciar to Henry II., 1154-1189, for money due by loan, and of the specific coins of which the plaintiff is being deforced, as of land.<sup>3</sup>

"*Rex vicecomiti salutem. Præcepe N. quod juste et sine dilatione reddat R. centum marcas quas ei debet ut dicit, et unde queritur quod*

<sup>1</sup> Big. Hist. Proc. 160.

<sup>2</sup> Ibid. 161.

<sup>3</sup> 2 P. and M. 172.

*ipse ei injuste deforciat, et nisi fecerit, summane eum per bonos summonitores quod sit coram me vel justiciis apud Westmonasterium a clauso Paschæ in quindecim dies ostensurus quære non fecerit.*"<sup>1</sup>

[The king to the sheriff: health. Command N. that justly and without delay he render unto R. one hundred marks which he owes him as he says and from which he complains that he unjustly deforceth him, and unless he shall do it, summon him by good summons that he may be before me or my justices at Westminster within fifteen days from the end of Easter to show why he has not done it.]

(b) *Scope and Proprietary Nature of Debt in the Reign of Edward I.*<sup>2</sup>

REPORTED Y. B. 32 EDWARD I. 15. ANNO 1304.

In a case where Robert de Cystone, parson of the church of Great Sayham, demanded certain debts from Robert de Chastel and Eleanor his wife, for money lent by him to the woman while she was single, etc.; Robert and Eleanor said that Eleanor never borrowed any money from him, nor did they owe any money to him, and that they were ready to deny, etc.; and they both did their law, first the husband and afterwards the wife, with their twelve compurgators. (This, however, is remarkable.)

REPORTED Y. B. 30 EDWARD I. 235. ANNO 1302.

Adam Scarlett brought his writ of Debt against the prior of Bodenne, and counted that tortiously he withheld from him ten marks, which, etc. for cloth bought of him, &c.; and he put forward an obligation under *seal*. — Mutford. He can claim nothing, for he was made bailiff of the town of B. in satisfaction of the debt. — Middleton. We did not take the office of bailiff in satisfaction, but simply to account to you for the issues; ready, etc. — And the other side said the contrary: therefore a jury.

REPORTED Y. B. 21 EDWARD I. 2 ANNO 1293.

One Adam brought a writ of Debt against B. for sixty shillings for land that he had sold to him for the sixty shillings. — Mutford. Sir, we tell you that he enfeoffed us of the said land by this charter which states that he was paid beforehand the sixty shillings which he now demands, and on the same contract; wherefore we pray

<sup>1</sup> 2 Pollock and Maitland, 210 (2d ed.).

<sup>2</sup> For a case of debt for money due from a surety, see Y. B. 7 Edw. II. 242. Cf. 2 Pollock and Maitland, 200; Holmes, Common Law, 264; *contra*, Ames, 8 Harv. Law Rev. 252.

judgment. — Metingham. Do you wish to say anything else? — Mutford. What have you to show the debt? — Asseby. Good suit. — Mutford. Sir, that he owes him a penny or a farthing as he demands, he (B.) denies against him and against his suit, and he is ready to make (his law) whenever the court adjudget. — Therefore to law.

REPORTED Y. B. 21 EDWARD I. 35. ANNO 1293.

One Adam brought a writ of debt against Henry de Bray, and counted that he tortiously detained and did not pay to him forty marks; and tortiously for this that whereas he delivered to him the manor of N. for the term of fifteen years, yielding to him one penny by the year, with a provision that, if he chose to hold the manor over the fifteen years, he should pay to the aforesaid A. and his heirs twenty marks by the year; and Henry held the manor for two years after the fifteen years; yet he withholds the forty marks for the two years, whereas the said Adam has often come to him and prayed him, etc., tortiously, etc. — Heyman. Sir, inasmuch as by his writ and his count he demands a rent issuing out of a frank tenement, by the form of the charter, and he does this by a writ of debt, we pray judgment if on this writ of debt he ought to be answered. — Seleby. We cannot recover by any other writ; neither can we distrain, because we are seised of the manor. Judgment if he ought not to answer. — Metingham. You might have distrained when the manor was in Henry's hand. — Seleby. Sir, the land lay uncultivated during the two years. — Metingham. Why did you not bring a *quia cessavit*, by virtue of the statute? — Seleby. Because the manor is not in their seisin but in our seisin. Judgment if, etc.

### (c) *Evolution of the Action.*

To-day debt is classed as a contract action, and a contract usually presupposes a promise. The promise is the basis of the action. To what extent, if any, debt in its origin was a contract action, to what extent to-day it preserves its ancient characteristics, may be gathered from the following pages.

“The writ of debt as given by Glanvill [and above stated] is closely similar to that form of writ for land which is known as a *præcipe in capite*. The sheriff is to bid the defendant render to the plaintiff so many marks or shillings, ‘which, so the plaintiff says,

the defendant owes him, and whereof he unjustly deforces him'; and if the defendant will not do this, then he is to give his reason for not doing so in the king's court. The writ is couched in terms which would not be inappropriate were the plaintiff seeking the restoration of certain specific coins, of which he was the owner, but which were in the defendant's keeping." 2 Pollock and Maitland, 171.

"In its earliest stage the action is thought of as an action whereby a man 'recovers' what belongs to him. . . . The case of the unpaid vendor is not essentially different from that of the lender: he has parted with property and demands a return. It enters no one's head that a promise is the ground of this action. No pleader propounding such an action will think of beginning his count with 'Whereas the defendant promised to pay'; he will begin with 'Whereas the plaintiff lent or (as the case may be) sold or leased to the defendant.' In short he will mention some *causa debendi* and that cause will not be a promise." 2 Pollock and Maitland, 210.

Briefly, the plaintiff demanded the money because it was his.

Ex. A. sold his ox to B. Of course B. got title to the ox at the moment of sale, and it was conceived that at the same instant A. got title to the unpaid money in B.'s pocket. When B. refused to pay, A. was being deforced of his specific coins. To recover them, he brought his action of debt.

Hence, the action was not *ex contractu*, but proprietary. Indeed, "Any formulated doctrine of *quid pro quo* was still in the future." 2 Pollock and Maitland, 210.

"The action of debt passed through three stages. At first, it was the only remedy to recover money due, except when the liability was simply to pay damages for a wrongful act. It was closely akin to — indeed it was but a branch of — the action for any form of personal property which the defendant was bound by contract or otherwise to hand over to the plaintiff. If there was a contract to pay money, the only question was how you could prove it. Any such contract, which could be proved by any of the means known to early law, constituted a debt. There was no theory of consideration, and therefore, of course, no limit to either the action or the contract based upon the nature of the consideration received.

"The second stage was when the doctrine of consideration was introduced in its earlier form of benefit to the promisor. This applied to all contracts not under seal while it prevailed, but it was established while debt was the only action for money payable

by such contracts. The precedents are, for the most part, precedents in debt.

"The third stage was reached when a larger view was taken of consideration, and it was expressed in terms of detriment to the promisee. This change was a change in the substantive law, and logically it should have been applied throughout. But it arose in another and later form of action, under circumstances peculiarly connected with that action. . . . The result was that the new doctrine prevailed in the new action, and the old in the old, and that what was really the anomaly of inconsistent theories carried out side by side disguised itself in the form of a limitation upon the action of debt.

"That action did not remain, as formerly, the remedy for all binding contracts to pay money, but, so far as parol contracts were concerned, could only be used where the consideration was a benefit actually received by the promisor. With regard to obligations arising in any other way, it has remained unchanged." Holmes, *Common Law*, 270.<sup>1</sup>

"It follows, from what has been written [in Dean Ames's article whence the following is quoted] that the theory that 'consideration is a modification of *quid pro quo*' is not tenable. On the one hand, the consideration of *indebitatus assumpsit* was identical with *quid pro quo*, and not a modification of it. On the other hand, the consideration of detriment was developed in a field of the law remote from debt; and, in view of the sharp contrast that has always been drawn between special assumpsit and debt, it is impossible to believe that the basis of one action was evolved from that of the other." Ames, *History of Assumpsit*, 2 Harv. L. Rev. 18.

*A Word by Way of Further Note as to the Development of Consideration in the Form of Detriment to the Promisee in the Action of Debt.*

"Originally there was no *quid pro quo* to create a debt against a defendant if the benefit was conferred upon a third person, although at the defendant's request. . . . [Later,] it became a settled rule that

<sup>1</sup> It is no part of the scheme of the present work to enter into a discussion of the merits of the controversy between great writers as to conflicting theories of the origin of consideration in the English law of contracts. To do so would be presumptuous on the part of the editor, and confusing to the student. More, it would be an unwarrantable trespass upon the field of substantive law. But the student has a right to know that there is such a conflict. Hence he should read the above-quoted words of Mr. Justice Holmes in the light of the following words of Dean James Barr Ames.

whatever would constitute a *quid pro quo*, if rendered to the defendant himself, would be none the less a *quid pro quo*, though furnished to a third person, provided that it was furnished at the defendant's request, and that the third person incurred no liability therefor to the plaintiff. . . . But it is an indispensable condition of the defendant's liability in Debt in cases where another person received the actual benefit that this other person should not himself be liable to the plaintiff for the benefit received. For in that event the third person would be the debtor, and one *quid pro quo* cannot give rise to two distinct debts." Ames, Parol Contracts Prior to Assumpsit, 8 Harv. L. Rev. 262, 263.

The above may be followed *pari passu* in the following cases.

REPORTED Y. B. 9 HENRY V. 14, PL. 23.

Ancient rule as to detriment a consideration in debt.

One man brought an action of debt against another and declared by Strange that on such a day and year and place he had recovered a debt of ten pounds in the Exchequer of our lord the king at Westminster against one T. and the defendant came to him in the same Exchequer, and said to the plaintiff if he would release execution against this same T. that then he would become debtor to him of the same ten pounds by virtue of which agreement he released to T. the execution, which is of record, and so he is become debtor to us, etc.

Westbury. You see well how he hath shown how if he would release the execution to the said T. that then he would become debtor, the which is not sufficient matter in law to charge him, for which judgment, etc., and upon this demurrer.

Cokaine. To my understanding the matter is not half sufficient. *Quære, Ex nudo patco non oritur actio*, etc., such is the opinion, etc.

REPORTED Y. B. 37 HENRY VI. 9, PL. 18.<sup>1</sup>

Later rule.

Per Moyle, J. "If I say to a surgeon that if he will go to one J. who is ill, and give him medicine and make him safe and sound, he shall have 100 shillings, now if the surgeon gives J. the medicines and makes him safe and sound, he shall have a good action [debt] against me for the one hundred shillings, and still the thing is to another and not to the defendant himself, and so he has not *quid pro quo*, but the same in effect."

<sup>1</sup> The case is long. Only a brief quotation is given, but it illustrates the point.

SANDS *v.* TREVILIAN.

IN THE KING'S BENCH. 1629.

REPORTED CROKE'S CHARLES, 193.

To make defendant liable in debt when another received the actual benefit, that other should not be liable to plaintiff.

Error of a judgment in the common pleas: where Trevilian, being an attorney, brought an attachment of privilege against Sands, and demanded against him debt of ten pounds; and declares, That he being an attorney there, the said Sands retained him to prosecute a suit in the common pleas betwixt one Symms and Worlich, and desired the plaintiff to be attorney for Worlich, and promised to pay him all his fees, and all that he should lay out to counsel and officers of the court in that suit; and shows, that he laid out such sums, which amount to the money demanded; whereupon he brought this action.

The defendant then pleaded *nil debet*, and found against him, and judgment for the plaintiff. Error was now assigned, That in this case debt lies not against him who so entreated him to be attorney; for there is no contract between them, nor hath he any *quid pro quo*; but he ought to have had an assumpsit (because he did it at his request), if he for whom he is retained doth not pay him his fees. — And thereto agreed all the court; but if he should have debt they doubted.

But Rolls, for the defendant, in the writ of error, showed, that he well might bring an action of debt, because he retained him, which is a consideration in itself; and he relied upon 37 Hen. VI. pl. 10, if one entreat a carpenter to make such a thing for another, or to serve another for such a time, and promiseth him ten pounds, debt lies; so 17 Edw. IV. pl. 5, if one promise one hundred pounds if he will marry his daughter, he marries at his request, etc. And he showed a precedent, *Bradford v. Woodhouse*, Cro. Jac. 520, wherein it was adjudged and affirmed in a writ of error, that debt lies. And he said there was a difference where one is retained generally for another with such a promise to pay his fees, and as much as he should expend in the suit, there debt lies: but if I retain one to be attorney for another, and promise if the other doth not pay, that I will pay, there if the party for whom the retainer is doth not pay, an action of the case lies against me upon my promise, and not an action of debt; but here an action of debt lies.

But all the court conceived, that no action of debt lies here, but an action upon the case only: for the retainer being for another man, and he being attorney for another man who agreed to that retainer, there is no cause of debt betwixt him who retained and the attorney, and no contract nor consideration to ground this action; and he who is so retained may well have debt for his fees against him for whom he was



retained, he having agreed thereto; wherein there cannot be any wager of law; but against the defendant, who is a stranger to the suit, and at whose request he took upon him to be attorney, debt lies not, as 27 Hen. VIII. pl. 24; and in the case of *Rolls v. Germyn* (Cro. Eliz. 425, Moor, 366) it was so resolved. Whereupon it was adjudged, that the first judgment should be reversed.

Richardson, Chief Justice, and Hutton and Harvey, justices of the common pleas, being moved herein, said, that this point was never moved before them; and they were of the same opinion, that debt lies not, but only an action on the case.

MARRIOT *v.* LISTER.*assumpsit.*

IN THE COMMON PLEAS. 1762.

REPORTED 2 WILSON, 141.

*consideration*  
One *quid pro quo* cannot give rise to two debts.

Case upon eight several counts in *assumpsit*, upon the general issue there was a general verdict and damages given for the plaintiff upon all the counts. And now it was moved in arrest of judgment that one of the counts was bad, and therefore as entire damages were taken upon this count as well as the rest, judgment ought to be arrested; the count objected to runs thus: "Whereas James Lister (such a day and year, at such a place) was indebted to Thomas Marriott in £20 for the like sum before that time lent and advanced by the said Thomas to James Dalrymple, at the special instance and request of the said James Lister, and being so indebted, he the said James Lister in consideration thereof afterward, to wit, at such a time and place, promised to pay to the plaintiff the said £20 when requested." *Per Curiam*. The word lent is a technical term, and no man can be indebted to another for money lent, unless the money be actually lent to that person himself; but this count alleges that the defendant is indebted to the plaintiff for money lent to a stranger James Dalrymple. Now James Dalrymple is certainly indebted to the plaintiff, because the money was lent to James Dalrymple, and the law raises the promise which is not necessary to be proved; therefore if James Dalrymple is indebted to the plaintiff for this sum lent to him, the defendant cannot be also indebted to him for it, because there cannot be a double debt upon a single loan. This is a special undertaking or promise to pay a sum of money lent by the plaintiff to a stranger, which the law does not raise, and therefore such special promise is traversable, and must be proved; but upon an *indebitatus assumpsit* for money lent to a defendant the law raises the promise, which is not traversable, and need not be proved. In short it is absurd to affirm A. is indebted to B. for money lent to C., for the

same money cannot be lent to two persons severally; and so is 1 Salk. Butcher against Andrews. And the judgment was arrested. Hewitt, serjeant, for the defendant, Davy and Burland, serjeants, for the plaintiff.

### CHARACTERISTICS OF DEBT.

So much for the ancestry of debt. We now come from the genealogy of the action to the action.

The following cases, each illustrating some element of the definition of debt, make its characteristics plain.

"Debt is, in some respects, a more extensive remedy for the recovery of money than assumpsit or covenant; for assumpsit is not sustainable upon a specialty, and covenant does not lie upon a contract not under seal; whereas debt lies to recover money due upon legal liabilities; or upon simple contracts express or implied, whether verbal or written; and upon contracts under seal, or of record; and on statutes by a party aggrieved or by a common informer; whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty." Chitty on Pleading, 121.

Taking Blackstone's definition (below quoted by Judge Bibb) as a basis we shall analyze the characteristics of debt.

"THE LEGAL ACCEPTATION OF DEBT IS A SUM  
OF MONEY," ETC.

### WATSON AND M'CALL *v.* M'NAIRY.

COURT OF APPEALS, KENTUCKY, SPRING TERM. 1809.

REPORTED 1 BIBB, 356.

Debt does not lie for a specific chattel.

Opinion of the court by Judge Bibb.

In an action of debt, M'Nairy declared upon a writing under seal, dated, etc., by which the defendants, Watson and M'Call, bound themselves to pay him "in the month of June, ensuing the date, one horse, at the value of thirty pounds."

He averred the defendants "had not delivered the horse in June (although his residence in Fayette was well known to them), nor upon demand on the — day of —, in the year —," etc. whereby an action accrued to him to demand and have the said

sum of £30 in money; and then assigns *breach* in non-payment of the money. . . .

[Judgment was rendered for the plaintiff in the sum of £30 for the debt, £4 1s. damage, and costs. To this judgment the defendants therein now brought this writ of error.—ED.]

The sole question is, did the action of debt lie upon the obligation as declared upon?

Blackstone, in his Commentaries, 3 vol. p. 153, says, “the legal acceptance of debt is a sum of money due by certain and express agreement, where the quantity is fixed and specific, and does not depend on any subsequent valuation to settle it. The non-payment of these is an injury, for which the proper remedy is, by action of debt, to compel the performance of the contract, and recover the special **sum due.**” So in Comyn’s Digest, title debt, 2 vol. p. 637, it is said, “Debt lies upon every express contract to pay a sum certain.” And herewith agrees the decision in 4 Coke, Slade’s Case. In Bacon’s Abridg. title debt, it is defined as an action founded upon an express or implied contract, in which the certainty of the sum or duty appears, and “therefore the plaintiff is to recover the same *in numero*, and not to be repaired in damages” by the jury, as in those actions sounding in damages. In Esp. Nisi Prius, p. 172, the same definition is given, and it is again said the plaintiff in the action is to recover *in numero* the sum he goes for, and not in damages. The great essentials in the action of debt are, that the contract be, first, for money; secondly, a sum certain; and thirdly, specifically recoverable. That the first and third members of this definition cannot apply to this contract, is clear at first blush. The contract is not for money, but a horse; and as that horse is uncertain, described only by price or value, the contract cannot be specifically enforced by a judgment. For being so indefinite, as equally to apply to every horse of such value, an action in the detinet, that is to say of detinue, would not lie, and that action is the only one in which a specific judgment for property can be rendered. **That** the second member of the definition does not apply, is perhaps not so self-evident, but not less true. That the sum mentioned in the writing is only descriptive of the property, and not necessarily the extent of the recovery, seems not to be questioned. That the recovery in case of a failure to deliver the horse ought not to fall short of the value at which he was to have been delivered, will be readily granted. But yet a greater sum might be recovered, and the plaintiff in the action below has actually obtained an assessment of extra damages. The recovery, however, does not arise out of a contract to pay the amount in

money, as the declaration has supposed, but sounds in damages for the breach of a contract, being the only relief which the forms of proceeding in our law are competent to give in a contract for such an indefinite property. If, upon failure to pay the horse, the demand became instantan a liquidated demand for money, as is supposed, then being due by a specialty, the interest would immediately attach as a legal consequence. But that the latter is not the operation of law, and that the action sounds in damages, in which a jury may or may not give interest, was decided by the court, at the Spring term, 1807, in the case of *Henderson v. Stainton*. Hard. 118. That decision was given after solemn argument, and the reasons of the decision need not be here repeated.

As this question is of considerable expectation, much agitated, . . . we have looked into the authorities, and find the judges and lawyers, who have treated of the action of debt, bearing uniform and harmonious testimony, concurring in the definitions before given. The numerous examples of cases in which debt for money will lie, put by Comyns in his digest before quoted, as well as by others, are all of contracts or agreements express or implied, or otherwise accruing for money, certainly due, a sum recoverable *in numero*, not sounding in damages.

We have found a report of a case seemingly variant from the principles before laid down. This is contained in a loose note to Bacon's Abridgment, title, debt, (A), for which the annotator refers to And. 117. We would gladly have examined the case, but have not been able to find the book referred to, and must therefore be content, for the present, with the statement (such as it is) in the note before mentioned. It is in the words and figures following:

"If one makes a bill to another in these words, Memorandum — I owe A. B. £20, to be paid in watches; an action of debt must be brought for the money, and not an action for the watches, for the number of watches is not certain."

That the note itself is a very loose abstract of the case referred to, or the case very loosely reported, or that the decision itself, if truly reported, is a very loose one, is clearly demonstrable. First. The argument of the case is, that the action would not lie for the watches, because the number of watches is uncertain. But suppose the number was certain, say four, would trover or detinue lie for four watches without other description of them? clearly not: for, after the number was fixed, the uncertainty and want of identity would be equally as fatal as before. Again, the argument is, because an action for the watches would not lie, therefore "debt must." Surely there is no such imperative consequence: case or

covenant, according to the predicament of the writing, would be a more appropriate action than debt. If any rational deduction can be drawn from the citation, it is nothing more than this: that the watches could not be recovered in kind, for want of a certain description to identify them in detinue, and therefore that the action must go for money. That the action must necessarily be in debt, would be an illegal and illogical conclusion. Therefore, some meaning must be attached to *et cetera* after the word debt; and according to the latitude and examples given by Coke in his explanations in like cases, that is implied by "etc." which the proper doctrines of the law, and the consistency thereof may require. This being supplied, the sentence should be read, "an action of debt, or rather of case or covenant, must be brought for the money." At any rate, we consider the testimony of a judge or reporter, whose mere dicta are so loosely and carelessly thrown together, to be totally insufficient to prove the law is so, in opposition to a host of lawyers and judges who have testified to the contrary.

The result from Slade's Case, before cited, p. 92, 4 Coke, is, that actions of debt are founded on contract, in which the plaintiff sets forth his demand in certainty, and insists upon being restored to it *in numero*. The doctrine seems to be clearly settled, that debt will not lie but where, according to established forms and precedents, judgment can be rendered for the very thing contracted for, and not for damages only. And proceeding on the same principle, Blackstone, in his Commentaries, 3 vol. pp. 155-6, after saying the writ shall be in the debt and detinet, and sometimes in the detinet only, thus emphatically says: "So also if the action be for goods, for corn, or an horse, the writ shall be in the detinet only; for nothing but a sum of money, for which I (or my ancestors in my name) have personally contracted, is properly considered as my debt. And, indeed, a writ of debt in the detinet only, for goods and chattels, is neither more nor less than a mere writ of detinue, and is followed by the very same judgment."

Suppose the defendants below had offered a plea of tender of thirty pounds, in money, in the month of June, would it have been any answer to the action? The obligors had contracted to deliver a horse, and, therefore, had no lawful excuse in a tender of money; the obligee had contracted for a horse, and could not have refused the horse, if tendered in time, and demanded to have money.

Upon the whole, we consider that the action of debt on the obligation will in no shape lie; not in the detinet only, or in detinue, because the horse was not certain, nor marked individually by contract, so that judgment could not be given for the thing specifically:

not in the debet and detinet, because not money, but a horse was contracted for. The action should have been in covenant to recover damages for a breach of the contract, if one had been committed, in non-performance of the act in the deed mentioned, — judgment reversed.

### ANONYMOUS.

IN THE QUEEN'S BENCH. 1584.

REPORTED ANDERSON, 117.

One made a bill to another in these words, "Memorandum. I owe A. B. £20 to be paid in watches;" on which it was demanded of the full court if the action of debt ought to be brought on the money or not, or if he shall be put to an action for the watches, and all the court said that an action ought to be brought for the money and not for the watches; for the number of watches is not certain. And this case is not parallel with the case 39 Hen. VI. fol. 36, to wit, If one sells to another twenty cloths for £500, on condition that he shall take two precious stones in lieu of £200, and certain pearls in lieu of £100, and £200 in money; for the action lies on the stones, pearls, and money which are certain, and whereupon an action might be based, but it is not so in the principal case. And note that it is said that if one sells a horse for £10, on condition that the vendee pay him in wheat to such a value, or if one sells a chattel for [so much] grain, an action lies in both cases for the corn and not for the money, to which the court assent; but this only applies when the quantity of the wheat is shown, otherwise, action does not lie to demand the wheat, for [the amount] is uncertain.

### · BRIKHED v. WILSON.

ANNO 1538.

REPORTED 1 DYER, 24 b.

Debt lies for some kinds of chattels.

See Trin. 12 Hen. VIII. Rot. 542. One Brikhed brought an action of debt against Wilson for forty quarters of malt, and declared upon two bills obligatory, by which the defendant "acknowledged himself to owe to the said plaintiff twenty quarters of good and proper malt, to be delivered on such a day in London, in an house, etc.; and if he failed at the day, that then he should lose and forfeit forty quarters;" and the plaintiff averred, that he did not deliver the twenty quarters at the day, etc., by reason whereof an action accrued, etc. And the defendant pleaded a tender at the day and

place aforesaid, of the twenty good and sufficient quarters, and that the plaintiff then and there refused to receive them, and this, etc. Upon which the plaintiff demurred, and adjudged for the plaintiff, and he remitted twenty quarters, etc., for he ought to have said that he was still ready to deliver the twenty quarters, etc.<sup>1</sup>

REPORTED Y. B. 34 EDWARD I. 151. ANNO 1306.

Debt may lie upon contract of barter.

A writ of debt was brought, and demanded ten quarters of wheat which he bought of him, to be paid on a certain day, and he did not, etc.—Lanfar. You did not buy any wheat of us, ready, etc.—Tiltone. And if your bailiff has received our money in your name, and for your profit, ought you not to answer?—Lanfar. We acknowledge that you bought of us so much wheat, to be paid on a certain day, on which day you were fully paid, and on the same day you received forty shillings' worth of timber for the forty shillings, ready, etc.—Tiltone. Since you have admitted the debt, and do not show any acquittance, judgment, etc.—Hengham. Do you accept the averment?—Tiltone. As before.—Hengham. Do you accept the averment?—Tiltone. Not paid, ready, etc.—But he was not driven to that by judgment; nor ought he to be, as appears by a similar plea in Michaelmas Term, in the twentieth year of King Edward.

### “DUE.”

#### BECKWITH *v.* NOTT.

IN THE KING'S BENCH. 1618.

REPORTED CRO. JAC. 504.

In case of a recognizance payable at two days, no action of debt should be brought until the whole sum is due. Cf. decision in *Rudder v. Price*, *post*.

Error of a judgment in an action on the case, upon an assumpsit made at Southwark.

The first error assigned was, That the declaration was not good; for he declares, Whereas, the defendant was indebted to him in four pounds, he promised at Southwark, upon such a consideration, that he would pay it him by five shillings the month; and allegeth, in fact, that he had not paid the said four pounds, nor any parcel

<sup>1</sup> “This form of the action ‘of debt’ differs from *detinue*, in that the property in any specific goods need not be vested in the plaintiff at the time the action is brought, which is essential in *detinue*. But this form of action is probably a survival of the time when debt in the *debet* and debt in the *detinet* were the same action.” Perry on Pl. 55.

thereof, according to his promise; and the action was brought within four months after the promise made, so before the money was due; and declares to his damage of six pounds. Upon *non assumpsit* pleaded, it was found for the plaintiff; and the damages were assessed to four pounds, and judgment given accordingly. And it was alleged to be erroneous; for he ought to have stayed the bringing of his action until all had been due, or to have demanded the sum which was due for the four months only, and not the entire debt: as in debt upon a bill or recognizance payable at two days, he may not bring his action until the whole sum is due upon the bill. But it was thereto answered, that this is not like to the case of a bill of debt, which is grounded upon the specialty, and cannot be demanded until the entire sum be due; but here it is grounded upon the promise, which is broken by every non-payment according to the promise; and he doth not demand any sum certain, but only damages; and it is at the discretion of the jury, whether they will find the entire sum in damages, or only so much as is due.

But when they give the entire damages, as here, Doderidge, J., said, that it is with an averment that it is given for the entire sum; and it shall be a good bar in a new action on the case upon that promise. And of that opinion were all the justices, except Houghton, who doubted thereof, and held that the declaration was not good, because he did not declare in certain, that the promise was not performed by the non-payment at such days, and did not demand damages for it: and not to say that the four pounds is not paid nor any parcel thereof; for the four pounds is not yet due. *Vide* 4 Co. 94, Dyer, 112. The judgment was therefore affirmed.—Note *ex hoc*, that where a man brings such an action for breach of an assumpsit upon the first day, it is best to count of damages for the entire debt, for he cannot have a new action.<sup>1</sup>

## “BY CERTAIN AND EXPRESS.”

### YOUNG AND ASHBURNHAM'S CASE.

IN THE COMMON PLEAS. 1587.

REPORTED 3 LEONARD, 161.

In an action of debt, brought by the administrators of Young against Ashburnham, the defendant pleaded *nihil debet*: and the enquest was taken by default. And upon the evidence given for the plaintiff, the case appeared to be this, that the said Young was an innholder in a great town in the County of Sussex where the ses-

<sup>1</sup> Another cause of error, not here relevant, is omitted.



sions used to be holden ; and that the defendant was a gentleman of quality in the country there ; and he, in going to the sessions, used to lodge in the house of the said Young, and there took his lodging and his diet for himself, his servants and his horses : upon which, the debt in demand grew : but the said Young was not at any price in certain with the defendant, nor was there ever any agreement made betwixt them for the same. It was said by Anderson, Chief Justice, that upon that matter, an action of debt did not lie. And therefore afterwards, the jury gave a verdict for the defendant.

### THE SIX CARPENTERS' CASE.<sup>1</sup>

IN THE KING'S BENCH. 1610.

REPORTED 8 COKE, 147.

"Brown held, That if I bring cloth to a tailor to have a gown made, if the price be not agreed in certain before how much I shall pay for the making, he shall not have an action of debt against me ; which is meant of a general action of debt ; but the tailor in such a case shall have a special action of debt ; *Sed*, that A. did put cloth to him to make a gown thereof for the said A. and that A. would pay him as much for making, and all necessities thereto, as he should deserve, and that for making thereof, and all necessities thereto, he deserves so much, for which he brings his action of debt ; in that case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to prove the said special contract, for the law implies it ; And if the tailor over-values the making, or the necessities to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making and the necessities thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, etc., for so much, unless it is so especially agreed. But in such case he may detain the garment till he is paid, as the hostler may the horse. *Vide* Br. Distress, 70, and all this was resolved by the court."

"In an action of debt the plaintiff must recover the whole debt he claims, or nothing at all. For the debt is one single cause of action, fixed and determined, and which therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof performance was sued for. If therefore I bring an action

<sup>1</sup> Only an extract is given.

of debt for £30, I am not at liberty to prove a debt of £20, and recover a verdict thereon; any more than if I bring an action of detinue for a horse, I can thereby recover an ox. For I fail in the proof of that contract which my action or complaint has alleged to be specific, express, and determinate." Blackstone's Commentaries, Book III. page 154.

### BLADWELL v. SLEGGEIN.

IN THE QUEEN'S BENCH. 1562.

REPORTED DYER, 219, b.

In debt the plaintiff declared upon a sale of certain woods for twenty pounds, and the defendant pleaded *nil debet per patriam*. And upon evidence it appeared that the bargain was only twenty marks. The jury (by the opinion of Catlyn, Chief Justice, and A. Browne) shall be bound to give a verdict for the defendant in this case as well as when the variance of the contract is of things sold, according to 21 Edw. IV. [22 a, pl. 2], because it cannot be intended the same contract. *Quære*, whether there be not some difference, because the plea is, he does not owe the sum or any part thereof in form as, etc., whence in detinue 22 Edw. IV. [2 a, pl. 8] of a chain containing three ounces, and in truth it contained only two, the defendant may safely wage his law; otherwise is it if the variance be only in the price or value.

### GAMMON v. VERNON.

IN THE KING'S BENCH. 1678.

REPORTED SIR THOMAS JONES, 104.

The lessor brought debt against the assignee of the moiety of the term for the moiety of the rent reserved on the lease, and it was resolved by the whole court, that the action well lay.

### INGLEDEW v. CRIPPS.<sup>1</sup>

IN THE QUEEN'S BENCH. 1702.

REPORTED LORD RAYMOND, 814.

Debt. The plaintiff declared upon a bill penal, sealed and delivered by the plaintiff to the defendant, reciting, that whereas the plaintiff had agreed with the defendant to sell him so many stacks of wood, the defendant for that covenanted to pay to the plaintiff

<sup>1</sup> So much of the case as does not illustrate the principle, "That is certain which can be so made," is omitted.

£35 for every hundred of the said stacks; and bound himself in the penalty of £100 to do it; then the plaintiff shows, that there was so many stacks, etc., and brings his action for £310, etc., as the total for all the said stacks. The defendant demurred. And it was objected [among other things, ED.] by Mr. Branthwaite for the defendant; (2) that admitting that the plaintiff might sue for the wood sold, yet he ought to have covenant and not an action of debt, because the duty was not certain, for the agreement is to pay so much for every hundred stacks that should be in such a place, and it [was, ED.] altogether uncertain how many stacks were there.

*Sed non allocatur.* For, *per curiam*, the plaintiff may have covenant or debt at his election. For the rate being certain, viz., £35 for every hundred stacks of wood; when the defendant has the wood, the agreement becomes certain, for which debt lies.

### JAMES H. KNOWLES *v.* INHABITANTS OF EASTHAM.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1853.

REPORTED 11 CUSHING, 429.

Debt does not lie for a certain sum which is the wrong sum.

This was an action of debt to recover the sum of \$32, the amount of damages alleged to have been awarded the plaintiff by the selectmen of Eastham, occasioned by laying out a town-way across the plaintiff's land. At the trial in the Court of Common Pleas, before Bishop, J., the plaintiff produced the report of the selectmen of Eastham, laying out said way, which, so far as [here] material, was as follows: "In locating said road, we have agreed with the owners of the land for the following sums as damages by them sustained in consequence of said road. James H. Knowles, \$48; \$32."

The names of nine other land-owners were also given, each being followed by a double column of figures, the aggregate amount in the second column being \$126.66, or two-thirds of the aggregate of the sums set in the first column.

This report was presented at a town meeting, April 3, 1848, and it was voted not to accept it. The county commissioners thereupon, upon a petition of several persons,<sup>1</sup> adjudged that "the common convenience and necessity of a part of the inhabitants of Eastham required that the report of said selectmen should be confirmed. They therefore approve and allow said road as laid out by the selectmen, as and for a town way, and direct the town clerk of Eastham to record the report of said selectmen of the same. The

<sup>1</sup> The petition set forth that the town refused to accept the road.

selectmen having agreed with the owners of the land over which said road passes for damages, the sum of \$126.66, as specified in the last column of their report, which sum we hereby confirm," etc.

The defendants, among other objections not material to be reported, objected that there had not been such a legal determination and assessment of damages sustained by the plaintiff as to support the action, but the presiding judge ruled otherwise, and a verdict was rendered for the amount claimed.

H. A. Scudder, for the defendants.

G. Marston (N. Marston, with him), for the plaintiff.

Dewey, J. Against each of the ten names of the land-owners is stated two different sums, thus, "James H. Knowles, \$48; \$32." Taking this report literally, both these sums are awarded to the plaintiff. But that is not supposed by either party to have been the intention of the selectmen. If not both, which one is to be taken to be the true estimate? It is then proposed by the plaintiff to take the smaller one. But that he cannot do, unless the smaller one is the actual estimate of damages fixed upon by the selectmen. This sliding scale of damages will not answer for practical purposes. Suppose the party should apply for a jury, and the question arises whether the jury have increased the damages awarded by the selectmen, which of these two sums is to be taken as the damages allowed by the selectmen.

It seems to us that this award of damages is too uncertain and indefinite in its amount to be the basis of an action against the town to recover the same in an action of debt.

New trial granted.<sup>1</sup>

## AGREEMENT.<sup>2</sup>

### ANONYMOUS.

IN THE KING'S BENCH. 1712.

REPORTED 1 SALKELD, 209.

*Per Curiam.* Debt lies in the Marshalsea, or any other courts, upon judgments in C. B. or B. R., and upon *nol-tel* record the issue shall be tried by certiorari and mittimus out of Chancery. The judgment being the gist of the action, *quære*, How that can be alleged to be within the jurisdiction? which is necessary.

<sup>1</sup> Both the statements of facts and the opinion are abridged.

<sup>2</sup> The error in Blackstone's definition becomes apparent from this case and the following cases. They are not cases of "agreement," but debt lies. Hence Blackstone's definition is too narrow. — ED.

BIGELOW *v.* THE CAMBRIDGE AND CONCORD TURNPIKE CORPORATION.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1810.

REPORTED 7 MASSACHUSETTS, 201.

By the Court.<sup>1</sup> “Whenever a statute gives a right to recover damages, reduced, pursuant to the provisions of such statute, to a sum certain, an action of debt lies, if no other specific remedy is provided.

“Let judgment be entered for the plaintiff for the amount agreed by the parties.”

UNDERHILL AND ANOTHER *v.* ELLICOMBE, CLERK.

EXCHEQUER OF PLEAS, TRINITY TERM. 1825.

REPORTED 1 M'CLELAND AND YOUNGE'S REPORTS, 450.

Where a statute points out a remedy for the recovery of money no other remedy exists.

This was an action of debt brought by the plaintiffs, surveyors of the highways, in the parish of Alphington, Devon, against the defendant, who is rector of the same, to recover £29 2s. 10½*d.*, being the amount of composition-money assessed upon him in lieu of statute duty, which he was charged to be liable to, in respect of the great and small tithes of the parish. At the trial at the Devonshire Summer Assizes for 1824, before Abbott, L. C. J., a verdict was taken for the plaintiffs, subject to the opinion of the court, on the following case.

The plaintiffs were lawfully appointed surveyors of the highways of the said parish, under the 13 Geo. III. c. 78, and the assessment, which is as follows:—

“Tithes, great and small—annual value £649—assessment £29 2s. 10½*d.*,” was duly made in form and amount. The defendant receives no tithes in kind, but is under a parol composition with all the tithe payers in the parish, for the whole of their tithes (great and small), from year to year. The composition is made with the farmers of the respective lands in which the tithes arise, is determinable only at six months' notice, and is made prospectively, without reference to the respective modes of cultivation on the particular estates in any particular year. The money assessed had been duly demanded; and the defendant had refused to pay it. Application had been made to the magistrates of the division for a

<sup>1</sup> The reporter's statement of facts and the arguments of counsel are omitted.

warrant of distress, which they had refused, entertaining doubts of the defendant's liability.

The questions for the opinion of the court were; — 1st, whether the plaintiffs, as surveyors of the highways, had any right of action? and 2d, whether, under the circumstances stated, the defendant is an occupier of tithes within the meaning of the several highway acts?

April 30. The case came on now for argument; but before it was commenced, Hullock, B., asked whether there was any objection to turning it into a special verdict, in order to afford an opportunity of bringing a writ of error from the decision of the court, if it should be thought expedient. To this Manning, on the part of the plaintiffs, assented, but Coleridge said he did not feel himself at liberty, on the part of the defendant, to accede to it, and the argument proceeded.

Manning, for the plaintiffs, said, that the question came before the court on the construction of the statutes 13 Geo. III. c. 78, 34 Geo. III. c. 74, and 54 Geo. III. c. 109, ss. 4 and 5. On the second point, he cited *The King v. The Justices of Buckinghamshire*, 1 B. & C. 485, E. C. L. R. vol. 1, 2 D. & R. 689, E. C. L. R. vol. 16; *Rex v. Lambeth*, 1 Str. 525, 8 Mod. 61; *Regina v. Bartlett*, 6 Vin. Abr. tit. "Poor," 427 (and *Hullock, B.*, referred to *Rex v. Turner*, 1 Str. 77, Id. 100, and *Rex v. Skingle*<sup>1</sup>). On the first, he argued that the plaintiffs had a right of action, relying on the three *placita* stated, in 1 Roll. Abr. 598; "Dett." K. pl. 18, 19, 20, and 7 Vin. Abr. 346, (K. 2), "Debt," 1, 2, 3. The first of these was thus, "where by the statute of 14 Hen. VIII. c. 5, and the letters patent of the king, it is enacted, that every one that practises physic in London, without license of the College of Physicians, shall forfeit for every month £5, one moiety to the king, and the other to the college; though no action is appointed for it, yet they have an action of debt for it, Trin. 4 Jac. B. R." [*Hullock, B.* — How would you get at that penalty, unless by action of debt?] In this instance, as the magistrates refuse to grant a warrant of distress, and the Court of B. R. will not compel them to do so by mandamus, there is no other method of recovering the composition-money than by action. Secondly, "an action of debt lies upon the statute 2 and 3 Edw. VI. for the treble value, for not setting forth tithes, though the statute does not mention any action, but only that he shall forfeit the treble value, and does not mention to whom he shall forfeit it, nor by what action it shall

<sup>1</sup> It was thought unnecessary to go further into the argument on this point, as the court decided on the other, exclusively.

be recovered, Co. "Entries," In this case the statute directs that suits concerning tithes shall be brought in the Ecclesiastical Court, yet the common law superadds an action of debt. Thirdly, "an action of debt lies by a sheriff upon the statute of 28 Eliz. c. 4, for his fees, given by the statute for an execution served by him, though the statute does not say that he shall have his fees, or any action for them, but only says that he shall not take for any execution served, any consideration or recompense, besides that thereafter in the said act mentioned, which it shall be lawful to be had and received, *scil.* 12*d.* for 20*s.* where the sum does not exceed £100 and 6*d.* where above £100." (Proby & Lumley *v.* Mitchell, 14 Jac. B. R.) In another report of this case, Moore, 853, it is said, that "because there is a duty, an action is given of necessity by the law;" now the necessity for the remedy, by debt, exists in the present case. [Hullock, B.—In all the cases you have mentioned, the sums of money to be recovered, or a moiety of them, are given to individuals in respect of what is conceived to be a private injury or right. Do you know any instance of a poor's rate being recovered by action of debt,—any case where a distress, or other specific remedy, distinct from an action of debt, is prescribed by a statute, and the party may have recourse to that action?] If the distress were not given, the right of action would necessarily follow. As it cannot be rendered available, the consequence ought to be the same. If the particular remedy prescribed by a statute be a competent one, then the party is precluded from any other; but where it is ineffectual, the action of debt should be allowed. The statute directs the payment of the rate. The assessment has been duly made; and as it is not recoverable otherwise, debt lies by construction of law. In *The King v. The Justices of Buckinghamshire*, Abbott, C. J., contemplated the possibility of the question coming before the Court of B. R. in another way. The only other way in which it could be brought before it is by action of debt. [Alexander, C. B.—Do you mean to say, that by this act of parliament the legislature have given to surveyors of highways an action in every instance, at their option, or only where the magistrates refuse a warrant of distress?] It would seem in every case. [Alexander, C. B.—That is contrary to the decisions on the poor laws. All that can be said is, that the legislature have given a remedy which is not universally effectual.]

Coleridge, *contra*.

Manning, in reply.

June 11. The Lord Chief Baron now delivered the judgment of the court, as follows:—

This is an action of debt by surveyors of highways, to recover the amount of composition-money duly assessed upon the defendant in lieu of statute duty. The plaintiffs had a verdict, subject to the opinion of the court upon a special case. In the discussion of the case, two questions have been debated. [His Lordship stated them.] We do not mean to give any opinion on the second of these, as the opinion we have formed on the first will entirely dispose of the case. We think that the plaintiffs cannot maintain the action. This is a claim given by statute, and the same statute which creates it prescribes a particular remedy for its enforcement. Therefore, it appears to us that no other can be resorted to. The 13 Geo. III. c. 78, s. 34, which imposes the charge, and ascertains its amount, provides, "that in default of payment, the money shall be levied by distress and sale of the goods and chattels of the person or persons refusing to pay the same, in such manner as the forfeitures for neglect to perform the statute duty are thereby authorized to be levied and raised;" and the 72d section directs the penalties and forfeitures to be levied by distress and sale, by warrant under the hand and seal of a justice of the peace. The 34 Geo. III. c. 74, in repeating the same provisions for the payment of a composition, points out a remedy for raising it, to exactly the same effect. These are the statutes which establish the right, to enforce which the present action has been brought. In creating the right, they also direct the remedy; and we have found no authority that any other can be pursued. No case in point has been stated in support of the action, and it appears to be a rather new experiment. In the case of *Stevens v. Evans*, 2 Burr. 1157, Mr. J. Dennison says, that "upon a new statute which prescribes a particular remedy, no remedy can be taken, but that particular remedy prescribed by the statute; therefore clearly no action of debt will lie for a poor's rate." This is an opinion against the present action. Independently of this, there are provisions in the same statutes, from which it is to be inferred, that no other remedy was in the contemplation of the legislature than that which is specifically mentioned; because these statutes expressly provide for an action of debt in those cases where that mode of proceeding was intended to be granted; but these provisions do not touch this case. The 13 Geo. III. c. 78, s. 67, authorizes the justice in default of distress to commit the party to jail. The 34 Geo. III. c. 74, contains a similar clause (s. 4), with this further provision,—that if it shall appear to the justices to whom application may be made upon the subject, that the party liable to the composition-money is then in indigent circumstances, and as such deserving of



relief; they are authorized, at their discretion, to discharge such party from the payment of it. Now if surveyors of highways possess this right of action, not only might it be made an instrument of great oppression and vexation, but it would probably deprive the magistrates of that power of remitting, or mitigating the charge, conferred on them by the clause just mentioned. The cases which were stated in support of this action do not maintain the proposition for which they were adduced. Generally they go to show, that if a statute prohibits the doing of a thing under a penalty, to be paid to the party grieved, or without saying to whom it shall be paid, and does not prescribe any mode of recovery, this action may, in such case, be maintained by the party grieved, and for that there are many other authorities. Com. Dig. tit. "Action upon Statute," (F), *Presid., etc., of Physicians v. Salmon*, 1 *Ld. Raym.* 682. Again, we find it distinctly laid down, that debt lies upon every contract in deed or in law. Com. Dig. tit. "Debt," (A), 1. The cases stated went to prove one or other of these propositions, but we think they do not apply here. In the case before the court, the parties suing are not the parties grieved; — a remedy by distress is expressly given by the statute; and no contract exists. Therefore we are of opinion, that the action does not lie, and that the verdict should be set aside, and a nonsuit entered.

*Postea* to the defendant.<sup>1</sup>

### HOOPER *v.* SHEPHARD.

IN THE KING'S BENCH. 1738.

REPORTED 2 STRANGE, 1089.

Error of a judgment in C. B. in debt upon a charter-party, whereby the defendant was to pay fifty guineas per month. And the plaintiff states, that £652 10s. was due for the whole, £152 10s. whereof he had received, and the remainder was £500 for which the action was brought. The defendant pleaded, that he had paid at the rate of fifty guineas per month for all the time the ship was in his service; and issue being taken that he did not; the jury find that £357 11s. remained unpaid, but say nothing as to the rest of the £500.

It was first<sup>2</sup> objected, that covenant, and not debt, was the

<sup>1</sup> The arguments of Coleridge, for the defence, and of Manning, in reply, are omitted.

<sup>2</sup> It was then successfully objected that this was an imperfect verdict, the jury not having answered to all they were charged with. — *Ed.*

proper action: but this was got over, it being founded upon a deed, in which case debt will lie, according to 1 Roll. Abr. 591; Cro. Eliz. 561, 758; 1 Roll. Abr. 597; Sti. 31; 3 Lev. 429.

### HICKMAN *v.* SEARCY'S EXECUTORS.

SUPREME COURT OF TENNESSEE. 1836.

REPORTED 17 TENNESSEE, 47.

Debt lies upon an implied contract, where the sum is certain.

This was an action of debt, by the defendants in error, against the plaintiff in error, in which the following facts were agreed: Thomas Hickman and Robert Searcy, in his lifetime, sold 609 acres of land to William Outlaw for \$1800, and made a deed with a joint warranty of title, under date of 26th of February, 1805. Robert J. Nelson recovered this land of Outlaw in the month of February, 1819, by ejectment, and turned him out of possession. Robert Searcy died in 1820, having appointed Stephen Cantrell and Jesse Blackfan executors, who both proved the will and qualified in October of that year.

Outlaw's heirs sued the executors of Searcy and Thomas Hickman upon the covenant of warranty, and in May, 1827, recovered \$2101.50 damages. Upon this suit the executors pleaded, fully administered, and an outstanding bond to the United States, etc., which pleas were found in favor of the executors, and judgment rendered against them *quando acciderint*.

Upon this judgment the heirs of Outlaw sued out a *scire facias* against the heirs of Robert Searcy, and on the 28th day of November, 1828, recovered judgment against them for \$2178, and recovered also \$19.32, the costs of the suit against the executors. This judgment against the heirs of Robert Searcy, and the judgment against Searcy's executors and Hickman, were transferred to John C. McLemore, and on the first of April, 1829, Stephen Cantrell, as executor of Robert Searcy, paid to McLemore \$2225.19, being the amount of the judgments, with interest up to that time. Said payment to McLemore was made out of the personal assets belonging to said Searcy's estate, in the hands of said Cantrell, executor, etc.

R. J. Meigs, for plaintiff in error.

The questions submitted to the court are:

1. Whether on these facts debt will lie by Searcy's executors against Hickman. In other words, will debt lie for contribution by one warrantor in a deed against his co-warrantors? We say not; and the true test whether debt will lie or not, is whether the sum

to be recovered has, upon the contract itself, a legal certainty. Hence it will not lie on any collateral undertaking, where the sum to be recovered is uncertain, and sounds merely in damages. 1 Mason, 296.<sup>1</sup>

Charles Scott, for the defendants in error.<sup>2</sup>

Turley, J., delivered the opinion of the court.

"The only question made by the plaintiff in error upon the case agreed is whether the action of debt is well brought. It has long been settled that the action of debt and *indebitatus assumpsit* are concurrent remedies upon all simple contracts where the sum to be recovered is made certain, either by the contract of the parties or by operation of law; indeed, the action of *indebitatus assumpsit* only became the common remedy upon such contracts in order to avoid the wager of law allowed upon actions of debt, as the action of debt is now about to supersede the action of *indebitatus assumpsit* to avoid the operation of the statute of limitations of three years. Is the sum sought to be recovered in this case specific and certain? Unquestionably it is so by the operation of law. A joint judgment had been obtained against the plaintiff and defendants in error, which was paid by the defendants. What does the law say upon this? That, as to one-half the amount, it is money laid out and expended for the use of the plaintiff by the defendant, and implies a promise to pay it; no other action than debt, or *indebitatus assumpsit*, could have been brought, for the contract is not express, but implied. Let the judgment be affirmed."

Judgment affirmed.

### COLLINS v. JOHNSON.

SUPERIOR COURT, D. ARKANSAS. 1835.

REPORTED FEDERAL CASES, 3015 a.

Debt may lie on an implied contract, no particular sum being expressed.

Yell, J., delivered the opinion of the court. "This was an action of debt, brought to recover the value of 4007 pounds of seed cotton, delivered by Johnson to Collins to be ginned. A demand was made for the cotton, and a refusal by Collins, and upon that refusal Johnson, the plaintiff in the court below, commenced this suit before Isaac Ward, a justice of the peace, in an action of debt on account. There was a judgment before the justice of the peace in favor of the defendant, Collins, from which judgment Johnson prayed an appeal

<sup>1</sup> A part of Mr. Meigs's argument is omitted.

<sup>2</sup> Mr. Scott's argument is omitted.

to the Clark Circuit Court; and at the October term of that court, 1833, Johnson recovered a judgment against Collins for the sum of \$52.59 and costs, to which judgment this writ of error is prosecuted.

"The plaintiff in error set up various grounds [the first only of which is here material] to reverse the judgment of the court below. 1. Because an action of debt will not lie to recover the price of cotton delivered at a gin, and a refusal to pay or redeliver, unless the cotton had been converted to cash, when the tort might be waived, and assumpsit sustained for money had and received to plaintiff's use. . . .

"The first objection taken by the counsel for the plaintiff in error presents a comparatively new question in this court for determination. But one adjudication in this court is to be found to aid us in coming to a direct decision. A similar point has been settled in this term, in the case of *James v. Buzzard* (Case No. 7206 *b*). By reference to the English authorities — 1 Saund. 133; 1 Chitty, 94; 1 Torren-ton, 112 — it will be found that assumpsit would lie. The plaintiff, Johnson, might have his election to waive the tort and sue in assumpsit, and a judgment in assumpsit would be a bar to any other action, and *vice versa* if he elected to bring a tort or trover. That the action of assumpsit would have been good, this court does not feel any doubt. Debt may be due by contract, either express or implied, but it is not essential that the contract should be specific, or that any particular amount be expressed. It may arise on an implied contract. The action of debt will lie where the sum to be recovered can be ascertained; as upon an account stated, or for goods sold to the defendant for as much as they are worth, Doug. 6. This doctrine is sanctioned by Washington, [?] J., in *Hughes v. Union Ins. Co. of Baltimore*, 8 Wheat. 311; namely, that when *indebitatus assumpsit* is maintainable, debt is also. 3 Com. Dig. 365. The principles settled by such high authority this court is unwilling to disturb."

Judgment affirmed.<sup>1</sup>

## HUGHES *v.* THE UNION INSURANCE CO. OF BALTIMORE.

SUPREME COURT OF THE UNITED STATES. 1823.

REPORTED 8 WHEATON, 294.

Debt lies to recover a less sum than that sued for. Cf. *U. S. v. Colt*, 1 Pet. Jr. 145.

This was an action of debt, upon a policy of insurance. [The action was for two distinct sums, \$18,000 on the ship, and \$2000 on

<sup>1</sup> Matter not relevant to the ground of error here alleged is omitted.

the freight. The judge instructed the jury, after giving other directions prayed for], "that this was a valued policy, on which an action of debt lies; the sum claimed being specified by an agreement of the parties. But the whole must be recovered, or no part of it can be recovered. In this suit the action is for two distinct sums, \$18,000 on the ship, and \$2000 on the freight. The party can recover either entire, and not the other; but not a portion of either, without accounting for the residue."

Mr. Justice Johnson delivered the opinion of the court.

"With regard to that part of the instruction which was given voluntarily by the court, it is necessary to remark, that although it does not appear to have been moved by the defendant's counsel, yet it was on a point certainly presented by the case; and as it is one on which this cause may, by possibility, be again brought up to this court, it is proper now to decide it.

"So far as it relates to the policy on the ship, there can be no difficulty. The plaintiff is entitled to the whole, or nothing. We are of opinion that he was entitled to the whole. But as the plaintiff demands only the sum of \$420 for freight from the 'Havanna,' the question arises whether, in this form of action, he could recover less than the \$2000 specified in the contract, and claimed by the writ. [Here the court repeated the charge to the jury above quoted.]

"On this subject, the court is satisfied that the law of the action of debt is the same now that it has been for centuries past. That the judgment must be responsive to the writ, and must, therefore, either be given for the whole sum demanded, or exhibit the cause why it is given for a less sum. Otherwise *non constat*, but the difference still remains due. That this is the law where an entire sum is demanded in the writ, and shown by the counts to consist of several distinct debts, is established by the case of *Andrews v. De la Hay*, Hobart, 178; that the law is the same where an entire sum is demanded, and only half of it established, is laid down expressly in the case of *Speak v. Richards*, Hobart, 209, 210, and adjudged in the case of *Grobham v. Thornborough*, Hobart, 82, and in the more modern case of *Ingle dew v. Creps*, reported 2 Lord Raym. 814, 816. Our own courts, in several of the States and districts, have also recognized and conformed to the same doctrine.

"And the same cases establish that the requisite conformity between the writ and judgment, in the action of debt, may be fully complied with, either by the pleadings, the finding of the jury, or a remitter entered by the plaintiff, either before or after verdict, or even after demurrer.

"If, therefore, the instruction to the jury on this point was in-

tended to intimate that they could not find for the plaintiff any less sum than the \$2000 valued on the freight, we deem it exceptionable, inasmuch as the plaintiff had a right to claim a verdict for the freight established by the evidence, and enter a remitter for the difference." Judgment reversed, and a *venire de novo* awarded.<sup>1</sup>

UNION IRON CO. *v.* PIERCE *et al.*

CIRCUIT COURT, D. OF INDIANA. 1869.

REPORTED FEDERAL CASES, No. 14,367.

Debt lies on penal statutes.

McDonald, District Judge. "This is an action of debt [upon a penal statute]. A general demurrer is filed to the declaration, and whether the demurrer ought to be sustained, is the question to be decided. . . .

"In support of the demurrer, it is contended that the action of debt will not lie on the provisions of the statute above cited, under any circumstances; and that as the action has been misconceived the demurrer must be sustained. In support of this view it is said that this is a penal statute, and the action it gives is consequently an action in form *ex delicto*. We do not understand that this consequence follows. We shall hereafter have occasion to inquire whether this is, in the technical sense, a penal statute. We think, however, whether it is such or not cannot settle the form of action to be adopted. For though it be regarded as a penal statute, this circumstance does not tend to prove that debt will not lie on the claim stated in the declaration. The action of debt lies in many cases on penal statutes. At common law, debt is a very extensive remedy. It lies on simple contracts, and on specialties for the payment of money. It lies on judgments for money, and on legal liabilities; and it lies for penalties and other liabilities created by statute, requiring the payment of money, when the statute declares no other remedy, and where the amount of the liability is certain, or may be readily rendered certain. 1 Chitty on Pl. 110-112. And we may lay it down as a general rule, that whenever the obligation is to pay a sum of money which, as to amount, is certain or may be readily rendered certain, whether the liability arises on simple contract, legal liability, specialty, record, or statute, the action of debt is a proper form of remedy."<sup>2</sup>

✓ Demurrer sustained [on other grounds].

<sup>1</sup> Only so much of the case as relates to the matter here discussed is presented.

<sup>2</sup> Only so much of the case as relates to the action of debt is reported.

SIMONTON *v.* BARRELL.

SUPREME COURT OF NEW YORK. 1839,

REPORTED 21 WENDELL, 362.

Though a statute gives a remedy by *scire facias*, debt may also lie.

Error from the superior court of the city of New York, Barrell sued Simonton and declared in debt on a judgment rendered in his favor, against the defendant, in a circuit court of the District of Columbia, held for the County of Washington. The defendant pleaded *nul tiel record, nil debet*, and payment. Issues being joined, the cause was brought to trial, when the plaintiff produced an exemplification of the record, and rested. The defendant produced another copy of the same record, with entries upon it, subsequent to the judgment, by which it appeared that the defendant had been arrested on a *capias ad satisfaciendum*, issued upon the judgment and discharged from such arrest by the attorney for the plaintiff upon an arrangement for the future payment of the debt. The discharge was professed to be granted in pursuance of an act of the legislature of Maryland, and without any express authority from the plaintiff. The act of Maryland, passed in 1789, was produced, by which it was enacted, that when a defendant is arrested on a *ca. sa.*, if the plaintiff, with the consent of the defendant, elects not to call the execution during the term to which it may be returned, it shall be lawful for him to proceed against any such defendant by a new execution, or such other process as the nature of the case may require, in the same manner as he might have done if such defendant had not been arrested on the former writ of execution. Upon this evidence the defendant contended, in the superior court of the city of New York, that he had sustained his second and third pleas. The court ruled otherwise, and the jury, by the direction of the court, found a verdict for the plaintiff. Judgment being entered on the verdict, the defendant sued out a writ of error.

S. Sherwood, for the plaintiff in error.

O. Bushnell, for the defendant in error.

**By the court, Cowen, J.** [who said in part:] "But take it that the plaintiff himself had signed the stipulation for a discharge, there can be no doubt that this action was maintainable within the statute of Maryland. The argument against that is founded on the words of the act, which, indeed, expressly gives the plaintiff a remedy only by farther execution or other process, which latter word may in strictness be confined to a *scire facias*. . . .

"It would be strange, after all this, if courts could feel themselves so fettered by words as to say that a statute which gives a remedy by *scire facias* would not extend to an action of debt. There is scarcely a difference even in form between the two; and none whatever in the substantial object. But allowing a new execution is clearly enough to lay the foundation of a similar construction. The judgment must be affirmed. . . ."

Judgment affirmed.

Per *Ld. Mansfield* in *Walker v. Witter*, *Douglass*, 6. "Debt may be brought for a sum capable of being ascertained, though not ascertained at the time of the action brought. (It had been said at the bar, that the value of Jamaica currency was fluctuating and uncertain.) It is not necessary that the plaintiff in debt should recover the exact sum demanded."

"From its origin down to the time of *Blackstone* the sum sued for was required to be certain, and not subject to subsequent valuation or settlement, and the plaintiff was defeated if he failed to prove the exact sum sued for. But a rather general qualification was added in modern [? See the *Six Carpenters' Case*, 8 Co. 147, 1610, A. D.] times, to the effect that it would lie if the amount of money sued for could be readily reduced to a certainty. It thus came to be used to recover the price of property sold, or the compensation of services rendered, although the price or compensation was not expressly agreed on by the parties. The action in such cases was helped out by the inference of fact that the parties must have intended the market price or the customary compensation, which was said to be capable of being reduced to a certainty by proof of such price or custom. The price or compensation was said to be certain under the maxim, *Id certum est quod certum reddi potest*." *Martin*, Civil Procedure, 39.

### RUDDER v. PRICE.

COURT OF COMMON PLEAS. 1791.

REPORTED 1 HENRY BLACKSTONE, 547.

If a note is for the payment of a sum certain in instalments due at different times, no action of debt will lie upon it until all the days of payment are past,

This was an action of debt on a promissory note payable by instalments, brought in a former term by the payee against an attorney, the maker, by bill of privilege. The first count, on which the



question before the court arose, after stating the debt to be £452 10s., which the defendant owed to and unjustly detained from the plaintiff, went on, "For that whereas the said Stephen on the thirtieth day of March in the year of our Lord 1790, to wit, at Westminster in the county aforesaid, made his certain note in writing, commonly called a promissory note, his own proper hand and name being thereto subscribed, bearing date the day and year aforesaid, and then and there delivered the said note to the said Richard, by which note the said Stephen promised to pay to the said Richard by the name of Mr. Richard Rudder or order, £52 10s. for value received by him the said Stephen, the same to be paid in manner following (that is to say) £20 on the first day of July then next, £20 on the first day of October then next, and £12 10s. on the first day of January next, by reason whereof and by force of the statute in such case made and provided, the said Stephen became liable to pay to the said Richard the said sum of money in the said note specified, according to the tenor and effect of the said note, whereby an action hath accrued to the said Richard to demand and have of and from the said Stephen the said sum of money in the said note mentioned, parcel of the said sum of £452 10s. above demanded, etc." There were also the common money counts for the residue of the sum of £420 10s. above demanded.

Special demurrer to the first count, the causes of which were, "That in and by the said first count of the said declaration, it appears that the said sum of £52 10s. in the said notes mentioned is not yet due or payable, nor can the same be sued for by the said Richard Rudder till after the first day of January in the year of our Lord 1791, and also for that no cause of action whatever is in the said first count of the said declaration stated or alleged against the said Stephen, etc." To the other counts, the defendant pleaded *nil debet*, on which issue was joined.

Lawrence, Sergt., in support of the demurrer.<sup>1</sup>

Marshall, Sergt., *contra*.

Lord Ellenborough. — "I take it, that at the time when Slade's case was decided, an action of debt could not be brought on a debt due by instalments, till all the days of payment were past. But this was certainly not on the ground that the plaintiff could not recover less than the amount of the sum demanded; for though long before that time the demand in an action of debt must have been for a thing certain in its nature, yet it was by no means necessary that the amount should be set out so precisely that less could not be recovered. In ancient times it was the common action for

<sup>1</sup> The arguments of counsel are omitted.

goods sold and delivered, and for work and labor done, in which cases, though the sum to be recovered is to be ascertained by a jury, and is given in the form of damages, still the demand is for a thing of a certain nature. The opinion, indeed, which was erroneously entertained, that in an action of debt on a simple contract the whole sum must be proved, has been some time since corrected. The idea that an action of debt could not be brought till all the days of payment were past, was founded on a good ground of law, that for one contract there should be but one action; and as a contract to pay a sum certain on several days of payment was considered as one contract, it followed that no action could be brought till all the days of payment were elapsed. The construction perhaps has been too literal, for between a contract to pay five sums of £20 on five different days, and a contract to pay £100 by five sums of £20 on different days, the distinction is merely verbal and consists in form; the substantial meaning is the same in each. This construction, however, has long prevailed. The objection indeed is only to the construction, not to the rule of law, which is evidently a just one if the contract be really entire, as to do a series of acts under a certain penalty. The history of the action of assumpsit given by Lord Coke in the second resolution in Slade's case is incorrect; the cases which he there cites show that the manner in which the action was brought prior to Slade's case, was by stating, not a general *indebitatus assumpsit*, for it was not brought merely on a promise, but a special action for a nonfeasance by which a special action on the case arose to the plaintiff.

"Thus in the case of *Norwood v. Read*, Plowd. 180, particularly referred to in Slade's case, which was on a contract to deliver corn at several times and at a stated price, the plaintiff declared that by the non-performance of that engagement at a particular time he had sustained this special damage, namely, that relying on the engagement of the defendant to deliver him the corn, he had contracted with A. and B. to deliver to them particular quantities out of the quantity of corn which he was to receive, and was greatly injured in his credit by not being able to make good that contract with them. Slade's case appears to me to be the first where general damages for the non-performance of a contract were laid as the cause of action. But not long after, the action of assumpsit was brought following the course in which the court had supported the action in Slade's case, and declaring generally without stating any special damage. The plaintiff was permitted to recover in assumpsit, yet he was obliged to demand the whole damages for the whole contract: and it seems to have been clearly understood by Lord

Coke when he was reporting Slade's case, that this was the law with respect to the action of assumpsit, for he states in the fourth resolution in that case that a recovery in assumpsit would be a bar to an action of debt on the same contract; the necessary result of which is, that in an action of assumpsit brought after the first default the plaintiff was obliged to go for damages for non-performance of the whole contract. Accordingly, in *Beckwith v. Nott*, Cro. Jac. 504, the action was brought on a promise to pay £4 by 5s. a month, and after a default of four months the whole £4 were given to the plaintiff in damages. In reading the report of that case, the singularity of permitting the plaintiff to recover the whole sum, when only four months were in arrear, is very striking; but the court held that the jury had a right to give, if they thought fit, the whole damages for the non-performance of the contract: and the reporter adds as a note of his own, 'that where a man brings such an action for breach of an assumpsit upon the first day, it is best to count of damages for the entire debt, for he cannot have a new action.' So in a case in 9 Car. 1, *Peck v. Ambler* in the margin of *Dyer*, 113, Berkley held, that if an action of assumpsit be brought on the first default, the plaintiff should recover damages for the whole time, and should never have another action for another default; for the contract was determined *et transit in rem judicatam* by the first action. This seems to have been understood to be the law till the case of *Cooke v. Whorwood*, 2 Saund. 164, where the court determined that in assumpsit to perform an award, whereby the defendant was awarded to pay the plaintiff several sums of money at several times, the action might be brought for such sum only as was due at the time when the action was brought, and that the plaintiff should recover damages accordingly, and have a new action as the other sums became due *toties quoties*. Antecedent to that time, the distinction between an action of assumpsit and an action of debt with regard to money payable by instalments rested on this, that the action of debt would not lie at all till after the expiration of all the times of payment; but the action of assumpsit might be brought on the first default; but then that one action exhausted the whole contract, and the plaintiff was to recover damages for the whole, as he could not have a fresh action. It seems from the fifth resolution in Slade's case, that the action of assumpsit was considered as being more advantageous than the action of debt, because it might be brought after the first default; and there is something in Lord Coke's reasoning in that part of the case which would lead one to suppose, what he certainly could not mean, that he thought the action might be repeated. The two authorities which he there cites, — namely,

Dyer, 113, *Peck v. Redman*, and Bro. Abr. tit. Action on the Case, pl. 108, — by no means confirm the position that assumpsit would lie after the first default of payment, for that default: the note in Broke is, ‘that in Trinity Term in the fifth of Queen Mary, it was agreed in the Common Pleas, that if a man undertake to pay £20 annually for the marriage of his daughter, for four years, and fail in the payment of two years, the plaintiff might have an action of assumpsit for the non-payment of the annuity for two years, although the other two years were not come.’ But this note is evidently an interpolation, for it appears from Dyer, 163 *b*, that Broke died upon the circuit in the vacation between Easter and Trinity Terms in the fourth and fifth of Philip and Mary: and besides this, the determination was directly the contrary; for the case to which the note refers was *Joscelin v. Shelton*, reported 3 Leon. pl. 11, Moore, 13, Bendloe in *Keilway*, 209, and was this, ‘Assumpsit was brought on an agreement by the defendant to pay to the plaintiff 400 marks in seven years by annual portions, in consideration of the marriage of the plaintiff’s son with the defendant’s daughter, and after verdict the judgment was arrested because the whole seven years were not expired, one of them being to come when the action was brought.’ The other case cited by Lord Coke, of *Peck v. Redman*, Dyer, 113, was of an agreement by the defendant to deliver to the plaintiff twenty quarters of barley every year during their lives, for which the plaintiff was to pay four shillings for each quarter, and the breach of the agreement was that the defendant had failed in the delivering of eleven quarters for three years, by which the plaintiff (the special damage being similar to that stated in the case which I mentioned from Plowden) was injured in his credit, and the profit he would otherwise have made, to the value of £30; but it would have been a very singular thing if the rule of construction, which was laid down in actions of debt, had been applied to such a contract as this, the proof of which, in all the terms of it, was not complete as long as both the parties were alive. The jury gave damages for three years, and the question was whether these damages were for the whole contract or not. Dyer states that three judges were of opinion that this recovery was a discharge of the whole contract, but that the other three held (which seems much more reasonable) that it was not; however, as the court was divided, no determination was given, and the case ends with *ideo quære*. In the older cases, it is admitted that an action of debt could not be brought for the payment of money due by instalments till all the days were past; the meaning of this was that no action would lie. The inconvenience of this rule put the judges upon a method of getting rid

NB.

of the supposed difficulty by having recourse to the action of assumpsit, which, where the assumpsit proceeds in demand of money, is in truth and substance, and so taken to be in some of the cases, a more special action of debt; for where the demand is for the payment of a sum of money, it is a technical fiction to call the sum recovered damages: it is the specific debt, and the jury give the specific thing demanded. In Owen, 42, Hunt's case, the inconvenience of the rule which the Chief Justice Anderson was about to proceed upon, though the determination was contrary to his opinion, is so very obvious that I mention it as a striking instance of the mischief which would have arisen if a method had not been found out to remedy it. It was an action on the case on an agreement in consideration that the plaintiff would permit the defendant to occupy certain lands for five years, to pay £20 a year by equal half-yearly payments of £10, after a year and a half were expired the action was brought for the rent then in arrear, and Anderson was of opinion that the plaintiff could recover no rent till the five years were elapsed, but the other judges were of a different opinion. In the cases in Cro. Eliz. 807, Cro. Jac. 504, and Cro. Car. 241, assumpsit was brought for money due by instalments, and so attentive were the court to the rule at that time that the plaintiff in the two latter cases recovered in damages the whole sum, including a payment not due, and the court supported the recovery, and gave judgment for him, saying in one of the cases, *Milles v. Milles*, Cro. Car. 241 (where the sum to be paid was £20, namely, £10 in one year, and £10 in another, and the whole £20 given as damages for the non-payment of the first £10), that they would intend that the damages of £20 were given only for the first £10. There is so little reason in this that there is some difficulty to follow it; but the foundation of the opinion fails when it is admitted that the sum really due may be recovered notwithstanding more is demanded than can be made good in evidence. I cannot indeed devise a substantial reason why a promise to pay money not performed does not become a debt, and why it should not be recoverable, *eo nomine*, as a debt. But the authorities are too strong to be resisted. Though the law has been altered with respect to actions of assumpsit, no alteration has taken place as to actions of debt. The note in question is for the payment of a sum certain at different times, must be considered as a debt for the amount of that sum, and being so considered, no action of debt can be maintained upon it till all the days of payment be past."

Judgment for the defendant.

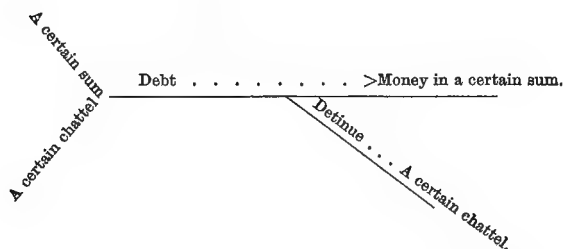
Afterwards the plaintiff had leave to amend.

## SECTION II.

## DETINUE.

*X. lent his horse to B. for a day. B. kept it for a year and a day, always refusing to return it. Clearly X. cannot have debt. He may, however, have detinue, an action closely akin to debt. The essence of detinue is the recovery of a specific chattel.*

## THE HISTORY OF DETINUE



Whence came the writ of detinue? We have already seen that anciently debt lay for a certain sum of money or a certain chattel; that in later years an action of debt was (refused for a certain chattel) and limited to money and the anomalous case of a certain quantity of a chattel (like malt or wheat) not in its nature specific. The parting of the ways between the action of debt for the recovery of a sum certain and the action for the recovery of a chattel certain marks the origin of detinue. The writ of debt in Glanvill's day contained words of "owing" and "deforcing"; no other word in English legal history is so eloquent of the proprietary nature of the ancient writ of debt as is Glanvill's "deforces." Soon, however, the "deforces" was dropped, and the writ became "*debet et iniuste detinet*" — defendant "owes and unjustly detains." To speak of "owing" money was perfectly natural; the idea of owing a chattel was incongruous. Who ever heard of owing an ox? But it is a usual and an easy use of words to speak of "detaining" one's ox, or of deforcing of one's ox. Every writ of debt

for chattels, therefore, was tainted with a word that shocked the sensibilities of the pleader. Had the writ of detinue developed in Glanvill's day, it would probably have been called the writ of deforcement (*deforciat*), coming at a later day, it vitalized the lifeless word "*détinet*" in the writ of debt, and became the writ of detinue. It lay to recover, anciently, a specific chattel, rightfully taken, wrongfully detained; later, any specific chattel, wrongfully detained. From the following pages, the student may clothe this skeleton history with living flesh.

### WRIT IN DETINUE.

The King to the sheriff, etc. Command A. that, etc. he render to B. a certain writing by which B. hath given and granted all his goods and chattels lately being in the manor of N. to I. of L. which he unjustly detains from him, etc.

Fitzherbert's *Natura Brevium*, 138.<sup>1</sup>

### ORAL DECLARATION<sup>2</sup> UPON A WRIT OF DETINUE.<sup>3</sup>

"In the case of a bailment, the plaintiff said, 'This sheweth you A., that B. wrongfully detains from him chattels to the value of £20, and therefore wrongfully, for that whereas the said A., on a certain day, year, and place, bailed to the aforesaid B. linen and woollen cloth, to keep till he demanded it, the said A., on such a day, year, and place requested the said B. to return the aforesaid chattels, yet he was not willing yet to return them, nor yet will,' etc." <sup>4</sup>

REPORTED 1 ROTULI, 6; ABBREV. PLAC. 5, ANNO 1194,<sup>5</sup> SAVORING OF DETINUE.

"Richard de W. puts all his land and whatever he has in pledge to convict Henry de M. that his (Richard's) brother handed over to him a war-horse on his march to Jerusalem, which he thus far detains. Henry defends and says that he gave to his own lord a palfrey for his march, and his lord gave to him a trotting pack horse. Pledges of Henry for standing to right (i. e. proving his plea). Roger E. and Albin."

<sup>1</sup> Big. L. C. on Torts, 420. "The first mention of this writ is in the Statute of Wales (*Statutum Wallie*, 12 Edw. I.)."

<sup>2</sup> For modern declaration in detinue, see *Dame v. Dame*, *post*, 52.

<sup>3</sup> See also Old Nat. Brev. 40 b, 41; 2 Reeves's Hist. 379; Finl. Ed.; Big. L. C. Torts, 421.

<sup>4</sup> Big. L. C. Torts, 421.

<sup>5</sup> 2 Big. Hist. Proc. 283.

## THE PARTING OF THE WAYS BETWEEN DEBT AND DETINUE. DEBT IN THE DEBET AND IN THE DETINET.

REPORTED 20 EDWARD I. 188. ANNO 1292.

Roger Mortymer brought a writ of detinue of a charter against dame Maud de Mortymer; who came, by attorney, and said, Sir, on the day and in the year in which they say that the charter was bailed to dame Maud, Roger le Mortymer her husband was alive; so that she could not then bind herself. Judgment if she be bound to answer. If you adjudge that she ought, she will do so willingly. — Huntindone. Sir, our plaint is of a tortious detinue of a charter which the lady now at this time detains from us. Judgment if she ought not to answer as to her tort. — Louther. The cause of your action is the bailment; and at the time [of the bailment] she could not bind herself. Judgment if now she ought to answer of a thing for which she could not bind herself. — Spigornel. If you had bailed to the lady when she was covert, etc., thirty marks to take care of, and to restore them when you should demand them, would she be bound now to answer? I think not. So in this case. — Howard. This case is not similar. In a writ of debt you would say, “she owes,” and here you will say, “which she unjustly detains”; judgment, etc. And on the other hand, our action arises from the tortious detinue and not from the bailment; judgment, etc. — Louther. As before. — Howard. If I had bailed twenty shillings or a charter to a woman, in this case I should, during her husband’s life, have an action against the husband and wife jointly: for the same reason I should have a good action against the woman alone, after the death of her husband, in respect of a bailment made to the woman; and in like manner I should have a good action against the woman alone after the death of her husband in respect of a bailment made to the husband and wife. So in this case, in respect of a thing bailed to the wife alone during the life of her husband.

## THE DISTINCTION BETWEEN DEBT AND DETINUE DRAWN.

REPORTED Y. B. 13 EDWARD III. 244.<sup>1</sup> ANNO 1339.

Detinue of chattels to the value of £100 against an abbot by a man and his wife, on a bailment, made by the father of the wife

<sup>1</sup> The note to the above, substantially a repetition, is here omitted.



when she was under age, of chattels to be delivered to his daughter when she was of full age, at her will; and they counted that he delivered pots, linen, cloths, and £20 in a bag sealed up, etc.—Pole. He demands money, which naturally sounds in an action of debt or account; judgment of the count.—Stouford. We did not count of a loan which sounds in debt, nor of a receipt of money for profit, which would give an action of account, but of money delivered in keeping under seal, etc., which could not be changed; and if your house were burnt, that would be an answer.—Schardelowe. Answer over.—Pole. We do not detain in manner as he has counted; ready to defend by our law.—Stouford. We have counted of the bailment made by another; wherefore, do you intend this to be your answer?

## THE CLOSE RELATIONSHIP OF DEBT AND DETINUE AFTER THE TIME OF EDWARD I.<sup>1</sup>

REPORTED Y. B. 17 EDWARD III. 141.<sup>2</sup> ANNO 1342-3.

Henry le Warde and Margaret his wife brought a writ, and demanded the reasonable part of the goods of Margaret's first husband against the executors of her first husband; and they demanded £200, and counted how by the custom of the realm a moiety of the goods which were her husband's on the day on which he died belonged to Margaret, and they showed how the husband had goods and chattels on such a day, and in such a place, when he died, to the amount of £400, whereof a moiety belongs to her portion, because he had no issue, etc.—Thorpe. This writ is brought against two executors, and notwithstanding that the grand distress is served, though it be the fact that one of them appears, one shall not answer without the other, because this is an action of detinue of which the statute<sup>3</sup> makes no mention, but only of an action of debt.—Grene. This action is properly an action of debt, because the goods could not be hers during the life of her husband, nor can they be hers after his death until she has recovered them.—Hillary. The process is quite the same in debt and in detinue; and in a plea of detinue the essoin and the warrant of attorney shall be in the words "*de placito debiti*."—Thorpe. That is only a form; but the actions are different; and *Privilegia Statuti sunt stricti juris*; and in detinue

<sup>1</sup> The line between these actions was first clearly drawn in his time.

<sup>2</sup> For a longer report, see 17 Edw. III. 145. The version given is shorter, clearer, and better adapted to this work.

<sup>3</sup> 9 Edw. III. c. 3.

of a writing against executors one shall not answer without the other. — Hillary. We have spoken among ourselves, and it seems to us that process in detinue as well as in debt is included in the statute ; and therefore answer. — And afterwards the writ abated for false Latin. *A.H.C.*

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DEBT AND DETINUE MAY BE JOINED IN THE SAME ACTION, FOR THEY ARE OF THE SAME NATURE.<sup>1</sup>

DALSTON, BART., *v.* JANSON.

IN THE KING'S BENCH. 1695.

REPORTED 5 MODERN, 90.

Doubts as to joinder of detinue and debt.

This was an action on the case brought against a common carrier upon the custom, and also a *trover* was laid in the same declaration. Upon not guilty pleaded, there was a verdict for the plaintiff.

It was moved in arrest of judgment, that these are different actions, and ought not to be joined in one and the same declaration ; for one is grounded upon a contract in law, to which *non assumpsit* is the proper plea, and the other upon a tort, etc.

To which it was answered that . . . these are not actions of different natures, and therefore they may be joined ; and the like has been done in many other cases ; as debt upon a bond and detinue were joined, etc.

*Curia.* "A plaintiff cannot join two actions which require several issues ; so that the question now is, whether actions may be joined where the same pleading will answer both ? In such cases as this, the defendant in former times pleaded particularly to the neglect ; but it has been lately ruled, that not guilty is a good plea. But it seems strange, that debt and detinue should be joined, because those actions have different judgments."

Upon the first debate of this case, they inclined for the plaintiff. But afterwards, when Rokeby, justice, came into the court in Michaelmas Term following, they were all of opinion that these were distinct actions ; for an action against a common carrier, upon the custom of England, is not so much upon a tort as upon a contract ; for by receiving the goods, and taking a reward for the carriage, the defendant implicitly undertakes to deliver them safely, and therefore the law implies a contract to answer the value, if robbed. The case of *Matthew v. Hopkins*,<sup>2</sup> the carrier of Tiverton, was upon

<sup>1</sup> The arguments are not reported in full, and the facts are abridged.

<sup>2</sup> 1 Sid. 244, 1 Vent. 365.

the common custom of the realm, for negligently carrying a bag of wool, in which there was fifty pounds, and in the same declaration there was a trover for the said money; and it was held, that these were different actions, and ought not to be joined, which is the case in point. So judgment was given for the defendant."

VINER, ABRIDGMENT, "ACTIONS," 40, PL. 22.

"A man may have debt and detinue in one and the same writ by several præcepes, for they are of one and the same nature. Br. Joinder in Action, pl. 97. cites 3 H. IV. 13."

## NATURE AND CHARACTERISTICS OF DETINUE. *Page*

"In this action of detinue it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like; for that cannot be known from other money or corn; unless it be in a bag or sack, for then it may be distinguishably marked.

"In order therefore to ground an action of detinue, which is only for the detaining, these points are necessary: 1. That the defendant came lawfully into possession of the goods, as either by delivery to him, or finding them; 2. That the plaintiff have a property; 3. That the goods themselves be of some value; and 4. That they be ascertained in point of identity." 3 Blackstone, Com., 152.

"The action of detinue is the only remedy by suit at law for the recovery of a personal chattel *in specie*, except in those instances where the party can obtain possession by replevying the same, and by action of replevin." Chitty, Pleading, 136.

## DETINUE IS THE ONLY REMEDY BY SUIT AT LAW.

### DUKE OF SOMERSET *v.* COOKSON.

IN THE HIGH COURT OF CHANCERY. 1735.

REPORTED 3 PERE WILLIAMS, 389.

The Duke of Somerset, as lord of the manor of Corbridge, in Northumberland (part of the estate of the Piercys, late earls of Northumberland), was entitled to an old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules. His Grace became entitled to it as treasure trove within his said manor. This altar-piece had been sold by one who had got the possession of it, to the defendant, a goldsmith at Newcastle, but who had notice of the Duke's claim thereto. The Duke brought a bill in equity to compel the delivery of this altar-piece in specie, undefaced.

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law, by an action of trover or detinue, and ought not to bring his bill in equity; that it was true, for writings savoring of the realty a bill would lie, but not for anything merely personal; any more than it would for a horse or a cow. So, a bill might lie for an heirloom; as in the case of *Pusey v. Pusey*, 1 Vern. 273. And though in trover the plaintiff could have only damages, yet in detinue the thing itself, if it can be found, is to be recovered; and if such bills as the present were to be allowed, half the actions of trover would be turned into bills in chancery.

On the other side it was urged, that the thing here sued for, was matter of curiosity and antiquity; and though at law only the intrinsic value is to be recovered, yet it would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it: which is like a trespasser's forcing the right owner to part with a curiosity, or matter of antiquity, or ornament, *nolens volens*. Besides, the bill is to prevent the defendant from defacing the altar-piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out, or erasing some of the marks and figures of it; and though the answer had denied the defacing of the altar-piece, yet such answer could not help the demurrer; that in itself nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again *in specie*; and the law being defective in this particular, such defect is properly supplied in equity.

Wherefore it was prayed that the demurrer might be overruled, and it was overruled accordingly.

### THOMAS KETTLE *v.* THOMAS BROMSALL.

IN THE COMMON PLEAS. 1738.

REPORTED WILLES, 118.

Willes, Lord Chief Justice, gave the opinion of the court as follows:

Detinue. The plaintiff declares in the first count that he was possessed of a handle of a knife with an old English inscription purporting it to be a deed of gift to the monastery of St. Albans, a ring with an antique stone with one of the Cæsar's heads upon it in basso-relievo, and of several other things of the like nature, particularly specified in the declaration, and laid together to be of the value of £500 as of his own proper goods; and that being so pos-

sessed he casually lost the same, and that afterwards by finding they came unto the hands and possession of the defendant, by reason whereof an action accrued to the plaintiff to demand the same of the defendant.

In the second count he declares that he delivered to the defendant the same things, specifying them again, of the value together of £500 to be safely kept and to be delivered to the plaintiff when required; that nevertheless the defendant, though often requested, has not delivered the same or any part thereof to the plaintiff, but refused and still doth refuse to deliver the same and unjustly detains them; to the plaintiff's damage £1000.

The defendant pleads that the plaintiff delivered to him the said goods and chattels to take care of them as his own proper goods, and to show them to any person or persons to know the value of them; and that the defendant having the said goods and chattels in his pocket to show them to such persons as were likely to tell him the value of the same, the said goods and chattels were feloniously taken from him by some person unknown to him without his wilful default or privity; and this he is ready to verify, therefore he prays judgment whether, etc.

The plaintiff replies that he did not deliver to the defendant the said chattels, in the declaration mentioned to take care of them as his own proper chattels, or to show them to any person or persons to know the value of them, as the defendant by the said plea hath alleged; and concludes to the country.

The defendant demurs; and for causes of demurrer shows that the plaintiff doth not by his replication fully answer to the matter in bar above pleaded, and that the said replication concludes to issue when it ought to have concluded with an averment, and thereby have given the defendant an opportunity to rejoin, and to have put the whole matter in issue in a direct affirmative and negative.

The plaintiff joins in demurrer.

Sergt. Comyns, for the defendant, took three objections; two to the declaration and one to the replication.<sup>1</sup>

1st. That the writ is for £1000 and the goods are laid in the declaration to be but of the value of £500. But there is not the least color for this objection; for there are two counts, and the goods in each are laid to be of the value of £500 and the damage at £1000.

2dly. That the first count is in trover, and the second in detinue; and that trover and detinue cannot be joined. That if the

<sup>1</sup> The objection to the replication is not material here.

first be taken to be in trover, there is no conversion; and if in detinue, there is no demand; and consequently that it cannot be good in either. To show that trover and detinue cannot be joined, he cited 8 Co. 87 b, Buckmere's Case; because they require different pleas.<sup>1</sup>

But we are all of opinion that this objection will not hold; for that both counts are in detinue. Detinue will lie for things lost and found, as well as for things delivered; so it is expressly laid down in Fitz. N. B. tit. "Detinue" (E), a book of the greatest authority. It was so also held as long ago as the 27 and 34 Hen. VIII, and there are several cases to the same purport in Glisson and Gulston, tit. "Detinue," a book of good credit. There are likewise several precedents of this sort in Townsend's tables, tit. "Detinue," a book of very good authority. And it would be very absurd if it were otherwise; for if so, a person might be greatly injured, and have no adequate remedy. For in trover only damages can be recovered; but the things lost may be of that sort, as medals, pictures, or other pieces of antiquity (and this seems to be the present case), that no damages can be an adequate satisfaction, but the party may desire to recover the things themselves, which can only be done in detinue.

So that taking it for granted (which I believe is so) **that** trover and detinue cannot be joined, yet this objection will be of no weight in this present case; and this likewise will answer the other part of the objection; for though there be no request or conversion in the first count, yet there is a request laid in the last count, and if one of the counts be good the general demurrer to both will not hold.

Judgment for the plaintiff.

## FOR THE RECOVERY OF CHATTELS WRONGFULLY TAKEN OR DETAINED.

ELIZ. COUPLEDIKE *v.* HESTER COUPLEDIKE.

IN THE KING'S BENCH. 1605.

REPORTED CRO. JAC. 39.

Error of a judgment in detinue in the Common Pleas.

A second<sup>2</sup> error assigned was, For that the writ supposeth a detainer *de unâ domo vocat* a beehouse, which cannot be, that a detinue should lie of an house.<sup>3</sup>— Wherefore it was reversed.

<sup>1</sup> See *Brown v. Dixon*, 1 Durnf. and E. 276.

<sup>2</sup> The first error assigned related to matter not here relevant.

<sup>3</sup> But see *Dame v. Dame*, 43 N. H. 37.

“EXCEPT IN THOSE INSTANCES WHERE THE PARTY CAN OBTAIN POSSESSION BY REPLEVYING THE SAME, AND BY AN ACTION OF REPLEVIN.”

DAME v. DAME.

SUPREME COURT OF NEW HAMPSHIRE. 1861.

REPORTED 43 N. H. 37.

In replevin, subject to an exception hereinafter stated, the original taking must be wrongful: in detinue, at the early law, it must have been rightful; at the later law, it may be wrongful or rightful.

This was an action of detinue, brought to recover a house and barn alleged to be the property of the plaintiff, and situated on the land of the defendant, in Farmington, in said county, all of which is fully set forth in the plaintiff's declaration, which is as follows:

“In a plea of detinue for that whereas the plaintiff heretofore, to wit, on the first day of July, 1856, at Farmington aforesaid, was lawfully possessed of a certain house and a certain barn, both situated on the land of the said Daniel Dame, being the house built by the plaintiff in the year 1842, said house being about thirty-six feet long and about twenty-six feet wide, and one story and one quarter high, and of the value of \$300.00; and said barn being about twenty-four feet long and about twenty feet wide, and of the value of \$200.00, situated between the house of Eleazer Rand and the house now owned by Benjamin Chesley, on the left hand side of the road leading from the Bay road, so called, to the Ten Rod road, so called, as one goes toward the Ten Rod road, as of his own house and barn, and being so possessed, the said plaintiff afterward, to wit, on the third day of July, 1856, casually lost the same out of his possession, which thereafterward, to wit, on the same day, came into the hands and possession of the said Daniel Dame, by finding; and the plea further saith, that although the said Daniel Dame well knew that the said house and barn were the proper house and barn of the plaintiff, and although requested by the said plaintiff, to wit, at said Farmington, on the nineteenth day of May, 1860, to deliver the same to the plaintiff, yet the said Daniel Dame hath no delivered up the said house and barn to the plaintiff, but wholly refuses so to do, and still unlawfully detains the same.”

To this declaration the defendant filed a general demurrer, and the plaintiff joined in demurrer; and the question of law was reserved.

L. Bell, for the plaintiff.

Sanborn, for the defendant.

Sargent, J. The only question here raised is whether in this State an action of detinue can be maintained. It is claimed by the defendant that this form of action was never introduced into this State, or if it ever has been used or authorized here, that it has from recent entire disuse become obsolete so that it cannot now be maintained.

**This action was early held to be an appropriate remedy in a certain class of cases.** It would seem that the original distinction between replevin and detinue was very similar to that between trespass and trover. Trespass *de bonis asportatis* was brought, not to recover the identical thing taken, but damages for the illegal taking and loss of the same, when such taking was unjust and unlawful, while trover was brought for the unjust detention and conversion of property where the original taking was lawful and proper.

So replevin was originally brought to recover the possession of a chattel *in specie* when the original taking was wrongful, and detinue to recover the article in specie when the original taking was lawful. 3 Black. Com. 144-152. Hence we find that the forms of the declaration in trover and detinue are similar, it being alleged in both that the property came to the hands and possession of the defendant by finding. To be sure Blackstone says that replevin can be maintained only in one instance of an unlawful taking, to wit, that of an unlawful distress. 3 Black. Com. 145. However this may have been in early times, when personal property was of but small consequence, and when legal remedies were mainly if not solely sought to acquire possession of real estate, or to enforce some right connected therewith, or to collect the rents chargeable thereon, yet in modern times it is held that the law is otherwise, and numerous authorities of the greatest weight lay it down that this action lies in all cases of illegal taking.

Chitty says, by replevin the owner of goods **unjustly taken** and detained from him may recover **possession thereof.** It is principally used in cases of distress, but it seems that it may be brought in any where the owner has goods taken from him by another. 1 Chit. Pl. 162. And again, "It has been said that replevin lies only in one instance of an unlawful taking: namely, that of an unlawful distress of cattle, damage feasant, or of chattels for rent in arrears; but as before observed, it appears that this action is not thus limited, and if goods be taken illegally, though not as a distress, replevin may be supported." 1 Chit. Pl. 164, and authorities cited. 2 Saund. Pl. & Ev. 760; 2 Wheat. Selw. N. P. 1194.



Replevin was generally a coextensive remedy with trespass *de bonis asportatis*. *Pangburn v. Patridge*, 7 Johns. 143, and authorities cited. *Thompson v. Button*, 14 Johns. 87.

There is one exception stated by Blackstone (Vol. III, 151), where he says, "If I distrain another's cattle damage feasant, and before they are impounded he tenders me sufficient amends, now, though the original taking was lawful, my subsequent detainment of them, after tender of amends, is wrongful, and he shall have an action of replevin against me to recover them." But that this is an exception to the general rule would seem evident from the manner and position in which it is stated. On page 145, an unlawful taking is stated as the first injury to the right of personal property or possession, for which the remedy is by an action of replevin. On page 151, he speaks of the second injury, which is an unjust detainer of another's goods when the original taking was lawful, for which the remedy in all cases stated, with the single exception above mentioned, is either detinue or trover. Now the learned commentator cites as his authority for the exception above named, Fitzherbert's Nat. Brev. 69, where the doctrine is stated thus: "If a man take cattle for damage feasant, and the other tenders him amends and he refuseth it, etc., now if he sueth a replevin for the cattle, he shall recover damages only for the detaining of them, and not for the taking of them, for that the same was lawful, therefore no return shall lie." Baron Gilbert, in his treatise on distresses and replevin, says this is the *only* instance in which replevin lies where the original taking was not tortious. Hammond (in his *Nisi Prius*, 334) says the same, and assigns the reason, namely, "that replevin is the proper action to try all questions arising out of a distress." Here is the cause why this single exception to the general rule was made, because this was the remedy so universally applied in all cases of distress, and so seldom in any other case, that Blackstone (erroneously) lays it down as applicable only there; it was held, therefore, as a matter of convenience in practice, that it should be extended to cover all cases of distress, even though in a single instance it should thus be carried beyond its original and appropriate limits.

With this single exception the common law rule is believed to be uniform that replevin does not lie unless the original taking was unlawful in fact, or made so in law by relation, under such circumstances as would have made the taking a trespass *ab initio*. [Our statute makes other exceptions. *Kimball v. Adams*, 3 N. H. 182.] To sustain these views, see, in addition, Com. Dig. & Replevin, A; Buller's N. P. 52; 3 Wooddeson's Lectures, 219; 2 Rolle's Abr.

441; Lord Redesdale in *Ex parte* Mason, 1 Sch. & Lef. 320, note; and also in *Ex parte* Chamberlain, 1 Sch. & Lef. 322; and in *Shannon v. Shannon*, 1 Sch. & Lef. 324; 7 Johns. 140; Story's Pl. 422, note; *Osgood v. Green*, 30 N. H. 210; *Gardner v. Campbell*, 15 Johns. 401.

But we find in different States that these actions have been generally regulated by statute and made to apply often to very different uses and purposes from those for which they were originally designed. To be sure we find in all the States, perhaps, the actions of trespass and trover retained, trover being generally extended in practice, so as to cover all cases of wrongful detention and conversion, without regard to the fact as to whether the original taking were legal or illegal; but we find that the actions of replevin and detinue have met with very unequal favor in the different States.

In Massachusetts, it has been held that replevin may be maintained in all cases of wrongful detention of the plaintiff's goods, although the original taking may have been justifiable. *Badger v. Phinney*, 15 Mass. 359; *Baker v. Fales*, 16 Mass. 147; *Marston v. Baldwin*, 17 Mass. 606; and in that State, too, it is held that detinue is obsolete. *Baker v. Fales*, 16 Mass. 154; *Colby's Prac.*, and *Howe's Prac.*, Detinue. But these decisions in Massachusetts, so far as they claim to rest upon the common law, have been so often and so seriously questioned, and are opposed by such an overwhelming weight of authority, both English and American, that they may well be considered as having very little weight upon the question. See argument of Webster and Metcalf, in *Baker v. Fales* (page 148), and authorities cited; and, also, the numerous notes by the editor, and authorities cited upon this case of *Baker v. Fales*, in the recent editions of *Massachusetts Reports*; and particularly, note 23, upon the action of detinue. See also *Wheat. Selw. N. P.* 1194, and note and authorities.

But it is said that these decisions in Massachusetts are authorized by their statutes; and if that were so, they would stand well enough, whether they accord with the common law or not. Mellen, C. J., in *Seaver v. Dingley*, 4 Greenl. 315, in speaking of these Massachusetts cases, says, that the court, after mature consideration, decided "that whatever might be the strict principles of the common law, the statute of 1789 had so altered the common law, that an action of replevin may be maintained in case of an unlawful detention, though the taking was not tortious and unlawful." But even this position is disputed, and it is claimed, with apparent reason, that these decisions cannot be sustained either upon the principles of the common law or upon the statute of that State. See

notes 36 and 37 to *Baker v. Fales*, and authorities cited, where it is said, that neither the form of the writ, as prescribed in that State, nor their statute "give any countenance to the notion that replevin may be maintained for an unlawful detention; but, on the contrary, extend only to cases of supposed unlawful taking." And, also, "that it is quite clear that at the common law no action of replevin could be maintained in this case."

Judge Story also seems to doubt whether these decisions in Massachusetts can stand even upon the statute of that State, and he does not hesitate to pronounce their doctrines as innovations upon the common law (Story's Pl. 442, note), where, in speaking of the doctrine that replevin may be maintained for goods unlawfully detained, although there may have been no tortious taking, he says, "this innovation on the common law, whether attributable to the statute or to the construction given to it, is to be regretted. The gist of the action is altered. It is no longer an unlawful taking, but an unlawful detention. The general issue, *non cepit*, though it can hardly be overruled as a good plea in replevin, has ceased to be a logical defence; indeed, is no more to the purpose than *nil debet* in assumpsit. It unsettles former decisions, unless some exceptions are set up without any other reason than a desire to avoid overruling former cases. Thus, it was formerly held that replevin would not lie on a bailment by the plaintiff; but if replevin will lie in all cases of unlawful detention, then it may be maintained in many cases of bailment; and, lastly, it has destroyed the analogy between the actions of trespass and replevin, where it existed before."

In Pennsylvania, it was decided at an early date that replevin would lie wherever one man claimed goods in the possession of another, no matter how the possession was acquired. But in that State the action of replevin is authorized and regulated only by statute. *Wallace v. Lawrence*, 1 Dall. 157. And the law continues the same. *Staughton v. Rappalo*, 3 S. and R. 562; *Keite v. Boyd*, 16 S. and R. 300. There could of course be little necessity for the action of detinue in that case.

In Virginia, it has been held that at common law replevin lay in all cases where goods were unlawfully taken. And this was the law in that State till 1823, when an act of the legislature confined the writ to the case of distress for rent. *Vaiden v. Bell*, 3 Randolph, 448. In that State we find the action of detinue in very common use, as it is believed to be in all the Southern and some of the Western States.

In South Carolina, while detinue was in common use, it is said

in *Byrd v. O'Harlin*, 1 Rep. Con. Ct. 401, that it is not decided in that State whether replevin will lie in any other case than that of a distress for rent.

So in Connecticut, while it is admitted that by the English authorities, as well as those of some of the contiguous States, replevin lies for any tortious or unlawful taking of goods and chattels, yet it is held that, under their statute, it lies only in cases of attachment and distress. *Watson v. Watson*, 9 Conn. 140; s. c. 10 Conn. 75.

In New York, previous to their Revised Statutes, they adhered strictly to the common law distinction between replevin and detinue, and both actions were used. See 7 Johns. 140; 10 Johns. 373; 14 Johns. 87, and 15 Johns. 402, before cited, which were cases of replevin; and *Todd v. Crookshanks*, 3 Johns. 432, which was detinue. But by their Revised Statutes (Vol. II, 533), the action of detinue was abolished, and the action of replevin was made, by express provision of law, to cover the same ground, or nearly so, that detinue had before covered.

But in North Carolina, on the other hand, it is held that detinue lies in every case in which the property is wrongfully detained, without regard to the manner in which the defendant acquired possession. *Johnson v. Preston*, Cameron and Norwood, 464.

It is said in 3 Black. Com. 151, that there is one disadvantage which attends this action (detinue): namely, that the defendant is herein permitted to wage his law, that is, to exculpate himself by oath, and thereby defeat the plaintiff in his remedy, and that for this reason the action itself is much disused, and has given place to the action of trover. See, also, Bac. Abr. Detinue. But the 3 and 4 Will. IV, c. 42, s. 13, abolished the wage of law in all cases; since which, this action has been much in use in England, and is said to be a very advantageous remedy, especially where it is material to embrace in the same action with a count in detinue, another count in debt, for a money demand as due upon a contract. 1 Chit. Pl. 121 and 125.

It does not seem to be clearly settled upon authority, whether the action of detinue should be confined to those cases where the possession was at first rightful, and only the detention wrongful, or whether that remedy, like trover, should be extended to all cases where the detention is wrongful, without regard to the quality of the original possession. The early authorities all favor the former view. Lord Coke says, "that detinue lyeth where any man comes to goods either by delivery or finding." Coke Litt. 286, b. Blackstone lays down this rule, that in order to maintain detinue the first point to be proved is, that the defendant came lawfully into

possession of the goods, as either by delivery to him or by finding them. 3 Bl. Com. 151: Bac. Abr., Det.; Wheat. Selw. N. P. 665.

But it is said by Chitty (1 Chit. Pl. 123) that it is a common doctrine in the books, that this action cannot be supported if the defendant took the goods tortiously; but he pronounces the reasoning upon which that opinion is founded as fallacious, and holds that it may be maintained in any case when the detention was wrongful, without regard to the manner in which the defendant acquired possession. And while there would seem to be no good reason for enlarging the remedy by replevin, any more than there is that of trespass *de bonis*; yet it may well admit of a *quære* whether, as a matter of convenience in practice, and not inconsistently with principle, the action of detinue should not be so far enlarged beyond its original limits, as to keep pace with its kindred action of trover.

It is alleged that detinue has never been used or authorized in this State, and that replevin, trespass, and trover afford ample remedies for all cases and classes of injuries. But trespass and trover are no substitute for detinue, for they only give damages for the goods taken or converted, without giving the party any chance to recover the chattel in specie. In regard to replevin, we understand that the common law is in force here, and that this action only lies in case of a wrongful taking in fact, or by intendment of law with the single common law exception of cases of cattle taken damage feasant, when amends are tendered before impounding, and other exceptions made by our statute in case of animals impounded, when it is held that it lies for a wrongful detention as well as a wrongful taking; *Kimball v. Adams*, 3 N. H., *ante*; but it must be against the person impounding, and cannot be against the pound-keeper while the creatures are in his legal custody; *Bills v. Kinson*, 21 N. H. 448, where it is said that our statute has added to the causes for which this action may be instituted at common law, not only in the above case of animals impounded, but in case of goods attached on mesne process, when claimed by a third person, and in case of goods exempt from attachment. Rev. Stat., c. 204, ss. 1, 2, and 3; Comp. Laws, 520.

In accordance with these views is the form of the writ prescribed by law in the action of replevin (Rev. Stat., c. 182, s. 14; Comp. Laws, 464), commanding the sheriff to replevy the goods belonging to A. P., of, etc., "wrongfully taken and detained," as it is said, etc. It would seem that this form embraces the common law, as nearly as may be, as stated in the English cases, replevin there being held to be the proper remedy in cases where property has been wrongfully taken and detained, whether as a distress or in any other way.

Replevin then does not encroach upon the common law ground of detinue, but leaves all that ground for the application of that remedy. It is only when replevin is carried beyond the common law limit, as in Massachusetts, by the court, and as it is in some States, as in New York, by statute, that it can be said at all to supersede the necessity of detinue as a remedy where the original taking was lawful, and it is desired to recover the thing detained, *in specie*.

Nor do we find our statutes silent concerning the action of detinue. In the statute of limitations of 1791, detinue is twice mentioned and enumerated with trespass, trover, and replevin, and the time of limitation is fixed for each. N. H. Laws of 1815, 164 and 165. In the later statute of limitations, passed in 1825, we find similar provisions, and the same enumeration of actions, in which detinue is twice repeated, as before. N. H. Laws of 1830, 76. And in the Revised Statutes, after specifying that certain actions, such as for words, etc., shall be brought within two years, it is provided, that all other personal actions shall be brought in six years. Rev. Stat., c. 181, ss. 3 and 4. Although detinue is not here enumerated specifically, yet the same is true of trover, trespass, debt, and all other actions having the same term of limitation.

It would seem that detinue was a remedy as fully recognized by our laws, and provided for as specifically as any of the other forms of personal actions. Nor is its place superseded by any other form of action. There are also good and sufficient reasons why it should be used, even if it were a concurrent remedy with replevin. In the latter, the plaintiff resumes the property in the first instance, and if he does not prevail, he must pay the defendant the value of the property, as by our practice there is no judgment for a return. *Bell v. Bartlett*, 7 N. H. 188. But in detinue, though the claim be to recover the specific chattel, yet it is not taken from the hands of the defendant till the right is determined, and the plaintiff takes his property on his execution. No bonds are required.

Detinue may also be joined with debt in the same declaration, which, in a large class of cases, is a decided advantage. It may also be brought for several articles, part of which are in existence, and can be recovered, and a part of which may have been converted, conveyed away, or destroyed; as the judgment in detinue is in the alternative, first, that the plaintiff do recover the goods in question specifically; or, secondly, if the plaintiff cannot have the goods, that he recover the value thereof, and his damages for the detention.

The jury must therefore find the value not only of all the goods in the aggregate, but of each article separately, so that the plaintiff

may have all that can be found of his property *in specie*, and for the balance, whatever it may prove to be, he may recover his damages, and this all in one suit and by a single judgment and execution. 1 Wheat. Selw. N. P. 667; Saund. Pl. and Ev., *ante*.

The difference in the course of proceedings, in the two cases (replevin and detinue), results naturally from the different injuries for the redress of which these remedies were invented. Where the taking was illegal and wrongful, the redress was by replevin, in which the possession of the property was immediately returned to the party from whom it had been thus wrongfully taken; and the parties were then left to determine their several rights. But where the possession was legally and rightfully obtained, as by a bailment, or a finding, but the further detention was claimed to be wrongful, the plaintiff was not allowed to take the property in any summary manner from the hands of the defendant, to whom, perhaps, he had himself committed it; but he must first try his title and establish his right, and if he proved the detention to be wrongful, he then recovered his goods.

We think, then, that there are sufficient grounds, both upon the statute and upon authority and reason, as well as convenience, for holding that detinue in this State can be maintained.

### JUDGMENT.

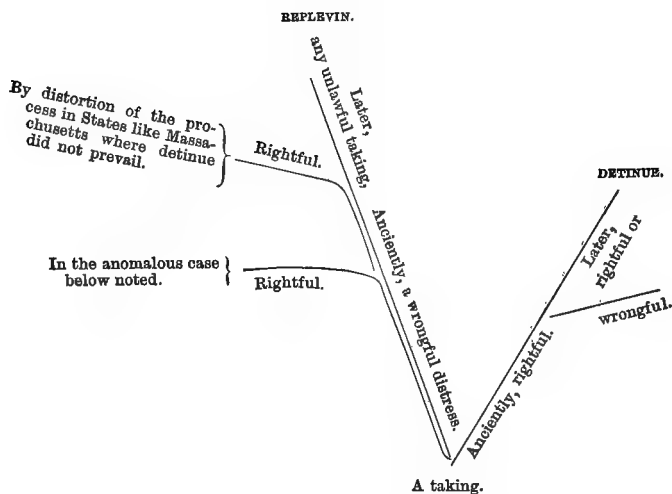
ADAPTED FROM POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW.

"Now at first sight the writ of detinue seems open to every one who for any cause whatever can claim from another the possession of a chattel. — X., the defendant, is to give up a thing which he wrongfully detains (*iniuste detinet*) from A., the plaintiff, or explain why he has not done so."

A. v. X. Detinue for an ox, which X. obstinately refuses to give up. In his count A., being bound to put some value upon the creature, says it is worth five shillings. Judgment for A., that he recover the ox, or five shillings, the value assessed by the jury. "If X. chooses to pay the money rather than deliver up the ox, he will, by so doing, satisfy the judgment. If he is still obstinate, then the sheriff will be bidden to sell enough of his chattels to make the sum awarded by the jurors, and will hand it over to the plaintiff." 2 Pollock and Maitland, 173.

## SECTION III.

## REPLEVIN.



X., a tenant of A., is stubborn, and refuses to pay his rent. X. owns cattle, and to his cattle he looks for his daily bread. The law gives A., his landlord, a remedy. A. may distrain X.'s cattle. The adequacy of the remedy is plain, for distraint amounts to dispossession. Z., a tenant, has paid his rent, but A., his landlord, is unscrupulous. Z. also owns cattle, and to his cattle he looks for his daily bread. A., wishing to extort money from Z., wrongfully distrains Z.'s cattle, and thus imperils Z.'s existence. A. is strong and Z. is weak. The law must be just. It must give Z. a remedy, and an adequate remedy. Money damages will not suffice. Z. must be repossessed of his cattle. He will have a writ of replevin. The early law records at least one important case, however, where replevin will lie for other than a wrongful taking. Y. finds T.'s ox in Y.'s field. Y. has a right to distrain and impound this damage-doing ox. Y. starts to lead T.'s ox to the pound, when T. comes and tenders the amount of the damage, and



says, "Give me my ox." Y. says, "You shall not have your ox." T. may maintain replevin, though the taking by Y. was rightful.<sup>1</sup> (In replevin, therefore, we can say, as a general proposition, that the taking must be wrongful, and in detinue, that by the early law it must, and by the later law it may, be rightful. Thus one distinction between replevin and detinue is already drawn. The others will as plainly appear.

## HISTORY OF REPLEVIN.<sup>2</sup>

"To replevy (*replegiare*, that is, to take back the pledge) is, when a person distrained<sup>3</sup> upon applies to the sheriff or his officers, and has the distress returned into his own possession, upon giving good security to try the right of taking it in a suit at law, and, if that be determined against him, to return the cattle or goods once more into the hands of the distrainer. This is called a replevin." 3 Blackstone's Commentaries, 13.<sup>4</sup>

"A distress is the taking of a personal chattel, without legal process, from the possession of a wrong doer, into the hands of the party grieved; as a pledge, for the redress of an injury, the performance of a duty, or the satisfaction of a demand." Bradby, *The Law of Distresses*, 1.

"Goods may be replevied two manner of wayes, viz., by writ, and that is by the common law, or by the pleint, and that is by the statutes for the more speedy having againe of the cattell and goods. A *replegiare* lyeth, as Littleton here teacheth us, where goods are distreined and impounded, the owner of the goods may have a writ *de replegiari facias*, whereby the sherife is commanded, taking sureties in that behalfe, to redeliver the goods distreined to the owner, or upon complaint made to the sherife he ought to

<sup>1</sup> The action, too, always lay for a distress legal in the beginning, but becoming illegal because of a detention after gage and pledge. 1 Brad. 156.

<sup>2</sup> Martin, 93. "The authorities all agree that replevin originated in common law as a remedy against the wrongful exercise of the right of distress for rent."

<sup>3</sup> Martin, 93. "The use of replevin in other takings was so rare for several centuries that we find Blackstone asserting that it lies only against a distrainer. But this restriction of the remedy never existed, even in theory. 3 Bl. Com. 145. Cf. *Schannon v. Schannon*, 1 Sch. & Lef. 327; *George v. Chambers*, 11 M. & W. 149; *Allen v. Sharp*, 2 Exch. 352; Comyn, Dig. Repl. A.

"Blackstone's statement was challenged as erroneous, and the action held to lie in all wrongful takings, except when done under process against the plaintiff." Comyn, Dig. Repl. D.

<sup>4</sup> See also Co. Litt. 145, b; 2 Roscoe Ac. 621; 3 Bl. Com. 145; as to the origin of Replevin.

make a replevy in the [county]. *Replegiare* is compounded of *re* and *plegiare*, as much as to say, as to redeliver upon pledges or sureties." Coke on Littleton, 145 b.

### VEE DE NAM (or *de vetito namio*), THE CONTEMPORARY OF EARLY REPLEVIN.

"A landlord at common law had the right without writ or precept to take the chattels of his tenant and retain them in his possession as security for rents due him. A wrongful exercise of this right was regarded as a serious offence against the Crown, which could not be redressed by the inferior courts without special authority emanating from the sovereign." Martin, Civil Procedure, 94.

REPORTED 30 AND 31 EDWARD I. 222. ANNO 1302.

A tradition of the ancient lawyers fixed the origin of "*de vetito namio*" in the reign of King John. *Sed quære. Vide post.*

The king brought his *quo warranto* against the burgesses of Launceston, and demanded by what warrant they claimed to have a burrough, and several other franchises, and also to hold pleas "*de vetito namio*." Hunt. We claim these franchises because we and our ancestors, and all the burgesses of the said town, have, ever since the Conquest, had and used these kinds of franchises. Berrewick. And what say you to the pleas "*de vetito namio*!" Hunt. We give the same answer. Berrewick. You claim to hold pleas "*de vetito namio*" from a time of which there is no memory; and the plea "*de vetito namio*" was first invented in the time of King John, and so within time of memory. Hunt. Although that name was first invented in the reign of King John, yet we, before time of memory, held pleas of tortious takings of beasts and chattels by attachment and distress. Berrewick. Therefore you ought to have claimed in that form; but now you have claimed by the phrase "*de vetito namio*." Hunt. We hold them to be one and the same thing. Brumpton. By God, they are not; for the plea "*de vetito namio*" is properly had before the sheriff, and it is a matter against the king's crown, and affected the king's peace in a high degree; therefore, tell us how you claim to hold these pleas. Hunt. If the defendant fall to do his law, he will be amerced, and the plaintiff will recover his damages; and if he do his law, the plaintiff will be amerced for his false plaint. Mutford. He claims to have held pleas "*de vetito namio*" before the time of memory; and as this kind of

plea had its origin in the time of King John, and so within time of memory, we pray judgment.

*De Vetito Namio Defined.*

"The action for *vee de nam* (*de vetito namii*) [was one] brought against a distrainor, who, though he has now given back the beasts,<sup>1</sup> has been guilty of detaining them against gage and pledge." 2 Pollock and Maitland, 524 (2d edition).

"If the distrainor will not deliver the beasts after gage and pledge have been offered, then it is the sheriff's duty to deliver them. For this purpose he may raise the hue, call out the whole power of the county (*posse comitatus*) and use all necessary force. 'When gage and pledge fail, peace fails,' says Bracton; in other words, the distraining lord is beginning a war against the state and must be crushed. The offence that he commits in retaining the beasts after gage and pledge have been tendered, is known as *vetitum namii*, or *vee de nam*. It stands next door to robbery; it is so royal a plea, that very few of the lords or franchises have power to entertain it. It is an attack on that judiciary system of which the king is the head. Disputes about the lawfulness of a distress were within the sheriff's competence. He could hear them without being ordered to do so by royal writ. But when he heard them he was acting, not as the president of the county court, but as a royal justiciar." 2 Pollock & Maitland, 577 (2d edition).

*Relationship between De Vetito Namio and Replevin.*

"Before the end of the thirteenth century, the action based upon the *vee de nam* was losing some of its terrors: either party could easily procure its removal from the county court to the king's court. Under the name of *replegiare* or replevin, an action was being developed which was proving itself to be a convenient action for the settlement of disputes between landlord and tenant; but it seems to have owed its vigour, its rapidity, and therefore its convenience, to the supposition that a serious offence had been committed against the king." 2 Pollock and Maitland, 577 (2d edition).

<sup>1</sup> Note that in *vee de nam* the plaintiff does not seek his cattle in the defendant's possession, as he does in replevin.

## REPLEVIN IN GLANVILL'S TIME.

*i. e. in the Reign of Henry II.*ORIGINAL WRIT OF REPLEVIN.<sup>1</sup>[*Glanvill (Beames)*, 238, c. 12.]

"The king to the sheriff, health. I command you, that justly and without delay, you cause G. to have his beasts by gage and pledges, of which he complains that R. has taken them, and unjustly detains them, for the customs which he exacts from him, and which he does not acknowledge to owe him; and in the meantime, cause him justly, etc., least, etc." <sup>2</sup>

"In the former part of this inquiry, into judicial proceedings, we have seen that when land was seised in the king's hand for default or contempt of the tenant, he might within a certain time replevy his land, upon performing what was required of him by the court. The power of distraining, which lords exercised over their tenants, required a similar qualification, either that the tenant should perform what was due, or at least till it was ascertained by judgment whether anything or what was due, he should replevy; that is, have a return of his goods upon pledges given as a security to stand to the award of justice in the matter. In order to affect this, several writs of *replegiare* or replevin were devised." Reeves, History of English Law, Vol. I, p. 439.

<sup>1</sup> 2 Pollock and Maitland, 578. "The replevin writ in Glanvill, XII, 15, differs in important respects from that in Bracton, f. 157, and Reg. Brev. Orig. f. 81." Thus, "The king to the viscount, greeting: Because A. has assured us, or otherwise because B. has assured you, &c. Put under bail and safe pledges R. that he should present himself before our justices, &c., at Westminster, on such a day, to show cause why he has taken the beasts of A. in such a county, where the said B. has nor lands nor tenements, although he has feuds, and has driven them from such county aforesaid as far as your county in fraud, beyond the power of so-and-so, our viscount, and there detains them as he says, against our peace." Brac. f. 157.

<sup>2</sup> For a full description of how proceedings in replevin were removed from the sheriff's court to the superior courts by *pluries* writs of replevin, see Martin, s. 107. If the sheriff failed to execute the original writ, an alias, not returnable to the Superior Court, was sued out. The next step was to sue out the *pluries* writ already mentioned, which contained the clause *vel causam nobis significes*, and was hence returnable process. It became usual to sue out the *alias* and the *pluries* writs at the same time. Wilk. Repl. 143; Fitzh. N. B., 68, 69, 70; Freeman v. Blewitt, 1 Salk. 410; Morris, Replevin, 53; Martin, s. 107.

## REPLEVIN IN BRACTON'S TIME.

(i. e. *In the reign of Henry III.*)

## THE STATUTE OF MARLEBRIDGE. [A. D. 1267.]

ENACTED 52 HENRY III.

A statute "providing for the better estate of his" (the king's) "realm of England, and for the more speedy ministration of justice, as belongeth to the office of a king."

## CAP. XXI.

## WHO MAY MAKE REPLEVIN OF BEASTS DISTRAINED.

"It is provided also, That if the beasts of any man be taken, and wrongfully withholden, the sheriff, after complaint made to him thereof, may deliver them without let or gainsaying of him that took the beasts, if they were taken out of liberties. And if the beasts were taken within any liberties, and the bailiffs of the liberty will not deliver them, then the sheriff, for default of those bailiffs, shall cause them to be delivered."

PLAINT.<sup>1</sup>

A. B. complains against C. D. in a plea of taking and unjustly detaining his cattle against sureties and pledges, etc.

Pledges to prosecute,	} E. F. <sup>2</sup> and G. H.

If the replevin be executed, and the deliverance made, where it is by plaint, the bailiff at the time he makes deliverance ought also to attach the defendant by his goods depending in the county court, to make him appear at the next court day; for in this action the attachment is the first process, because the replevin complains of a tortious taking, which is in nature of a trespass. *Gilb. L. of Distresses*, 80; *McKelvey*, 48.

<sup>1</sup> "To take away all the delays that attended the replevin by writ, the sheriff by this act [the Statute of Marlbridge] may upon complaint made, command his bailiff either by word or precept to replevy the plaintiff's beasts, for possibly the sheriff cannot write (which was frequently the case in those days), or has not the materials of writing with him, and this the sheriff may do out of his county court; for this act being made for the more speedy administration of justice, hath received the most favorable construction. . . . But then, the sheriff must enter the plaint at the next court, that it may appear on the Rolls of the Court." *Gilb. L. of Distresses*, 69.

<sup>2</sup> *Gilb. L. of Distresses*, 257.

## PROCEDURE IN REPLEVIN UPON PLAINT.

“The subject of replevin and distress will be understood better if we trace it from its commencement through all its stages. When any one had a complaint that his cattle were taken or detained against gage and pledge, he either applied for a writ commanding the sheriff *quod replegiari facias*, as we saw in Glanville’s time ;<sup>1</sup> or made a verbal complaint to the sheriff, who, upon having security *de proseguendo*, properly given, would, without a writ, proceed to make replevin. The manner of replevying was this : The sheriff went in person, or sent one of his officers, to the place where the cattle were detained, and demanding a sight of them. If this was denied him, or any violence was done to prevent it, he might immediately raise the hue and cry, and apprehend the offenders, as persons who acted in manifest violation of the king’s peace, and put them in prison. If he could not find the cattle to make deliverance of them, and it appeared that they were driven away ; then, if the taker had any land and chattels in the county, the sheriff’s officer was to take some of his cattle to double the value, and detain them until the distress was brought back, which, in after times, was termed a taking in withernam. If the sheriff’s power could reach no further, recourse must be had to a writ of attachment as follows : ‘*Si A. fecerit, etc., prone per radium et salvos plegios B. quod sit eorum justitiariis nostris apud Westmonasterium, etc., ostenens quare cepit averia ipsius in comitatu, etc., ubi idem B. non habet terras nec tenementa et ipsa fugavita à prædicto comitatu, etc., usque ad comitatum tuum in fraudem, extra potestatem vice comitis, etc., et ibidem ea detinet, contra pacem noctram, ut dicit, etc.*’<sup>2</sup>

“If no opposition was made to the sheriff or his officer, but he was suffered to have a sight of the cattle, he was immediately to cause them to be delivered to the complainant ; and then he gave a day to both parties, to appear at the next county, that the taker (who could not deny the taking against the sheriff’s testimony, he, in this case, having the authority of a record) might show his taking to be just ; and the complainant, that it was unjust. At the day appointed in the county, the taker could have no essoin, as an unjust taking and detention against gage and pledge was considered in the unfavorable light of a robbery, and was held to be against the peace even more than a disseisin was. At the day, the taker was to state his reasons for the caption. The grounds upon which

<sup>1</sup> Vol. I. Reeves’ History of English Law, 440.

<sup>2</sup> Bracton, 157.

a justification for taking cattle might be rested were many," [Thus,] "The defendant might avow the taking to be just, because he had a freehold in which neither the plaintiff nor any one else had a right of common, or other easement, and yet the plaintiff had put his cattle there without any right, and therefore he took them; though he was ready to restore them if the plaintiff would abstain from the like trespass, which he refused to do." Reeves' History of English Law, Vol. II. pp. 308, 309, 310.

## REPLEVIN AFTER THE STATUTE OF MARLEBRIDGE.

### STATUTE OF WESTMINSTER THE SECOND. [1285.]

ENACTED 13 EDWARD I. C. 2, s. 1.

A RECORDARE TO REMOVE A PLAINT TO PLEDGES TO PROSECUTE SUIT.  
SECOND DELIVERANCE.

#### CAP. II.

**Forasmuch** as lords of fees distraining their tenants for services and customs due unto them, are many times grieved, because their tenants do replevy the distress by writ, or without writ: And when the lords, at the complaint of their tenants, do come by attachment into the county, or unto another court, having power to hold pleas of withernam, and do avow the **taking** good and lawful, by reason that the tenants disavow **to** hold aught, nor do claim to hold anything of him which took the distress and avowed it, he that distrained is amerced, and the tenants go quit; to whom punishment cannot be assigned for such disavowing by record of the county, **or of other** courts having no record.

"II. It is provided and ordained from henceforth, That where such lords cannot obtain justice in counties and such manner of courts against their tenants, as soon as they shall be attached at the suit of their tenants, a writ shall be granted to them to remove the plea before the justices, afore whom, and none other where, justice may be ministered unto such lords; and the cause shall be put in the writ, because such a man distrained in his fee for services and customs to him due. 3. Neither is this act prejudicial to the law commonly used, which did not permit that any plea should be moved before justices at the suit of the defendant. 4. **For** though it appear at the first show that the tenant is plaintiff, and the lord defendant, nevertheless, having respect to that, that the lord hath distrained, and sueth for services and customs being behind, he appeareth indeed to be rather actor, or plaintiff, than the defendant. 5. And to the intent the justices may know upon what

fresh seisin the lords may avow the distress reasonable upon their tenants. 6. From henceforth it is agreed and enacted, That a reasonable distress may be avowed upon the seisin of any ancestor or predecessor since the time that a writ of novel disseisin hath run. 7. And because it chanceth sometimes that the tenant, after that he hath replevied his beasts, doth sell or aliene them, whereby return cannot be made unto the lord that distrained, if it be adjudged.

“III. It is provided, That sheriffs or bailiffs from henceforth shall not only receive of the plaintiffs pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded. 2. And if any take pledges otherwise, he shall answer for the price of the beasts, and the lord that distraineth shall have his recovery by writ, that he shall restore unto him so many beasts or cattle; 3. And if the bailiff be not able to restore, his superior shall restore. 4. And forasmuch as it happeneth sometime, that after the return of the beasts is awarded unto the distrainor, and the party so distrained, after that the beasts be returned, doth replevy them again, and when he seeth the distrainor appearing in the court ready to answer him doth make default, whereby return of the beasts ought to be awarded again unto the distrainor, and so the beasts be replevied twice or thrice, and infinitely, and the judgments given in the King's Court take no effect in this case, whereupon no remedy hath been yet provided: 5. In this case such process shall be awarded, that so soon as return of the beasts shall be awarded to the distrainor, the sheriff shall be commanded by a judicial writ to make return of the beasts unto the distrainor; in which writ it shall be expressed, that the sheriff shall not deliver them without writ, making mention of the judgment given by the justices, which cannot be without a writ issuing out of the rolls of the said justices before whom the matter was moved. 6. Therefore when he cometh before the justices, and desireth replevin of the beasts, he shall have a judicial writ, that the sheriff taking surety for the suit, and also of the beasts or cattle to be returned, or the price of them (if return be awarded) shall deliver unto him the beasts or cattle before returned, and the distrainor shall be attached to come at a certain day before the justices, aforewhom the plea was moved in presence of the parties. 7. And if he that replevied make default again, or for other cause return of the distress be awarded, being now twice replevied, the distress shall remain irrepleviable. 8. But if a distress be taken of new, and for a new cause, the process aforesaid shall be observed in the same new distress.”



HALLET *v.* BYRT.

IN THE KING'S BENCH. 1696.

REPORTED 5 MODERN, 252.

Since the sheriff in his county court could not make replevin, but by writ in open court, at least before the statute of Marlebridge which gave the permission; the hundred courts, which are derived out of the county courts, and to which the statute of Marlebridge does not extend, cannot grant replevins out of court.

Trespass against Byrt and Hallet, for taking and detaining the plaintiffs cattle.

The defendants plead not guilty as to all, but the taking of three cows; and as to that, they say, that the hundred of Beaminster is an ancient hundred, whereof the Bishop of Salisbury was seised in fee, and that he and his predecessors have time out of mind kept a court there from three weeks to three weeks, for the trial of personal actions under the value of 40s., and so prescribes to grant replevins either by himself or steward in court or out of court, upon complaint made to them of the taking and unjustly detaining any cattle within the said hundred.

That the Bishop did afterwards convey this hundred to one Whirlock for three lives, by virtue whereof he was seised. That the plaintiff and one Rodbart took and impounded the cows within the said hundred, being the cows of a stranger, who made complaint thereof to the steward, and he directed his warrant to the bailiff of the hundred and to the said Hallet, commanding them to replevy the cattle, by virtue whereof Hallet and the other defendant Byrt, in *auxilium ejus*, did take and deliver them to the owner, and traversed that they were guilty of the taking at any time before the warrant, or after the return, *aliter vel alio modo*.

The plaintiff hath demurred, and showed for cause, that this plea did amount to the general issue.

But the court did not speak to this point.

They [the court] held that at common law no replevin was made by plaint, for that was a remedy given by the statute of Westminster the first, cap. 16, the other was by writ of justices in replevin directed to the sheriff, who thereupon either went himself, or made a precept to his bailiff to make deliverance. Now if the sheriff in his county court, which is a court incident to his office, could not make a replevin, but by writ in open court, before the statute of Marlbridge, which gives a quicker remedy by plaint, and was made for the benefit of the owner of the cattle, that he

should not stay from them till next court; how can the hundred-court, which is derived out of the county court, prescribe to grant replevins out of court, when the authority of the sheriff himself so to do began by an act of parliament? It is true, all these courts do hold plea in replevins, but it is illegal, for the party ought to go to the sheriff for that purpose, whose court is in nature of a court-baron.

Therefore this custom [for the hundred courts thus to grant replevins] was held to be void, for it was against law and reason; and so the plaintiff had judgment, the plea being naught.

## STATUTE XI. GEORGE II. [1738].

### CAP. XIX.

#### AN ACT FOR THE MORE EFFECTUAL SECURING THE PAYMENT OF RENTS, AND PREVENTING FRAUDS BY TENANTS.

XXIII. And to prevent vexatious replevins of distresses taken for rent, Be it enacted by the authority aforesaid, That from and after the said twenty-fourth day of June, one thousand seven hundred and thirty-eight, all sheriffs, and other officers having authority to grant replevins, may and shall in every replevin of a distress for rent, take in their own names, from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (such value to be ascertained by the oath of one or more credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorized and required to administer) and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded, before any deliverance be made of the distress; and that such sheriff, or other officer as aforesaid, taking any such bond, shall at the request and costs of the avowant, or person making conuzance, assign such bond to the avowant or person aforesaid, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses; which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereupon; and if the bond so taken and assigned be forfeited, the avowant, or person making conuzance, may bring an action and recover thereupon in his own name; and the court where such action shall be brought may by a rule of the same court give such relief to the parties upon such bond, as may be agreeable to justice and reason; and such rule shall have the nature and effect of a defeasance to such bond.

## WRIT DE WITHERNAM.

The king to the sheriff of Lincolnshire, greeting ; Whereas we have many times commanded you that justly, etc. to A. his cattle which B., etc. or signify the cause, etc. wherefore you would not or could not execute our command many times directed to you thereupon ; and you have signified to us, that after the aforesaid **B.** took the cattle of the aforesaid A. in your county, he drove them out of the said county, into the county of B. whereby you could not replevy them to the same A. We being willing to counteract the malice of him the said B. in this behalf, command you, that you take the cattle of the aforesaid B. in your bailiwick in withernam, and detain them until you can, according to the law and custom of our kingdom, replevy to the same A. his cattle aforesaid, according to the tenor of our commands aforesaid before to you, etc.<sup>1</sup>

## SCOPE AND NATURE OF THE ACTION.

FLETCHER *v.* WILKINS.

IN THE KING'S BENCH. 1805.

REPORTED 6 EAST, 286.

Replevin does not lie for damages merely.

Lord Ellenborough, C. J., delivered the unanimous judgment of the court.

"This was an action of replevin against four defendants, in which the two first defendants avow as overseers of the poor of the hamlet of Milton, in the parish of Shipton, in the county of Oxford ; the third, as churchwarden of the same hamlet ; and the fourth defendant, as their bailiff, makes cognizance for taking the plaintiff's cows under the warrant of two justices of peace for levying by distress upon the goods and chattels of the plaintiff a poor's rate, after the same had been duly demanded. The defendants conclude their avowry and cognizance by averring, that no demand of the perusal or copy of the warrant was ever made upon or left at the usual place of abode of the defendants by the plaintiff, or his attorney, or agent, as required by the statute ; and pray judgment and a return of the cows, etc. To which avowry there is a frivolous plea in bar, and a demurrer thereto ; assigning for cause, that the plaintiff has not by his plea to the avowry and cognizance

<sup>1</sup> " And in the writ of withernam he ought to rehearse the cause which the sheriff returneth for which he cannot replevy them." Fitz. N. B., 73 F.

in any manner answered that part thereof in which it is alleged, 'that no demand was made of the perusal and copy of the warrant therein mentioned;' but hath by his said plea admitted that no such demand was made. To this there is a joinder in demurrer. And the question arising upon these pleadings is, whether the stat. 24 Geo. II. c. 44, s. 6 (which provides that no action shall be brought against any constable or other officer for anything done in obedience to the warrant of a justice until demand shall have been made, in the manner prescribed by that act, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand) extend to the action of replevin. The cases upon this subject are *Milward and Caffin*, 2 Sir W. Blackstone's Rep. 1330; in which case the court determined that the action of replevin was 'an action *in rem* to which that statute had been never holden to extend:' and *Pearson v. Roberts*, Willes's Rep. 668; in which it was decided that an action of replevin could not be maintained against persons making a distress for not performing the highway duty, as a demand had not, previous to the commencement thereof, been made of the justices' warrant. And Lord Chief Justice Willes there distinguished between a replevin by plaint or mandatory writ to the sheriff, to have the goods again, which he stated not to be within the statute, and replevin by action to recover damages. And in addition to this there is the authority of an *obiter dictum* of Lord Kenyon in *Harpur v. Carr*, 7 Term Rep. 270,<sup>1</sup> that but for the case of *Milward and Caffin* he should have thought replevin within the statute. And one cannot but feel the force of the observation made by Lord Kenyon on that occasion, 'that convenience requires that it should be so, otherwise it is in the plaintiff's power to evade the provisions of the act, by adopting a particular mode of proceeding which depends on his own choice.' The case in Willes's Reports seems to go on a distinction between an action of replevin where damages are to be recovered, and a proceeding only to have the goods again. But the industry of the gentleman who very ably argued this case has not succeeded in discovering such first-mentioned mode of proceeding by action of replevin to recover damages, as contradistinguished from proceedings to have the goods again. There does not appear in any of the books any proceeding in replevin which has not commenced by writ, requiring the sheriff to cause the goods of the plaintiff to be replevied to him, or by

<sup>1</sup> In that case it was decided, that a churchwarden taking a distress for a poor's rate under a warrant of magistrates was entitled to the protection of the statute 24 Geo. II. c. 44, in an action of trespass.

plaint in the sheriffs' court, the immediate process upon which is a precept to replevy the goods of the party levying the plaint. Both those modes of proceeding are *in rem*, *i. e.* to have the goods again; and if so, and there should not be any action of replevin for the recovery of damages only, then the case in Lord Chief Justice Willes's Reports will be an authority, in addition to that of Milward and Caffin, to show that the statute 24 Geo. II. does not extend to the case now before the court. The reason assigned by Lord Kenyon *ab inconvenienti* has undoubtedly great weight; but on the other hand it appears to us that the inconvenience of depriving the subject of his remedy by replevin is full as great, if not greater: for it may happen that no damages which a jury is properly authorized to give can compensate the loss of a particular chattel which the owner may be forever deprived of, if he cannot sue a replevin."

Judgment for the plaintiff.<sup>1</sup>

### SHANNON IN REPLEVIN *v.* SHANNON.

IRISH COURT OF CHANCERY. 1804.

REPORTED 1 SCHOALES AND LEFROY, 324.

For replevin to lie, there must have been a taking.

Mr. Bell had obtained a conditional order for an attachment against the plaintiff for an abuse of the writ in replevin, in issuing and executing it in such a case as the present, and for restitution of the goods taken. The affidavit of the defendant William Shannon, on which the rule was made, stated that a writ had issued to the sheriff of the county of Down to replevy one mahogany desk, etc., that the said goods were the property of the defendant, (he having bought them) and were in his possession at the time of the taking, and *that they were not taken as a distress for rent*. That the plaintiff, Samuel Shannon, who is the defendant's father, is far advanced in years and become weak in understanding: that he had been seduced from the defendant's house where he had before resided, to the house of one Francis Moore, who employed an attorney to endeavor to get the goods in question. The affidavit then stated the circumstances of the taking and carrying away of the goods; and that a bill had been filed in the Exchequer at the suit of Samuel Shannon against defendant, to impeach certain deeds under which the defendant claimed to hold these goods.

<sup>1</sup> The reporter's statement of facts, the arguments, and part of the opinion are omitted.

On the part of the plaintiff were read, the affidavit of Francis Moore and of Mr. John Norman the attorney for the plaintiff, which stated the belief of the deponent that the goods were the property of the plaintiff Samuel Shannon, who had been obliged to leave the house of the defendant, (his natural son) from the ill treatment he received there; that the plaintiff had had the goods in his possession while he lodged in the defendant's house, and that when he quitted the house, defendant wrongfully detained them. And Mr. Norman swore that having stated these facts to eminent counsel, he was advised to take this proceeding by replevin.

Mr. Saurin, for the plaintiff, referred to the authorities already cited in Chamberlain's case and the usage in this country: <sup>1</sup> and observed that as trespass may be brought upon a constructive taking founded on a detention without right, so also might replevin.

Mr. Bell for the defendant. Replevin is founded solely on a taking by distress; 3 Bl. Com. 146.

The Lord Chancellor (after observing that no *taking* (which is the foundation of replevin) was suggested in this case, and that it was not denied on the part of the plaintiff that the bill in the Exchequer related to the same goods) proceeded.

"I have, in consequence of what passed the other day, conversed with the Lord Chief Justice on this subject; and he thinks (and it is the opinion of the other judges as he informs me) that the use of the writ of replevin in cases like the present is a crying grievance: the courts of law are put into a difficulty: they do not know how to deal with it. How is a party to be put into the situation he ought to be in when a right to property is to be tried? the first evidence of property is possession, and that you take from him in the first instance, and you throw the *onus* of proving title upon him, on whom, as having the *prima facie* title, possession, that *onus* ought not to be thrown. The defendant in this case may have conducted himself extremely ill, but the law has provided certain remedies adapted to certain cases; and upon the affidavits which are made on his behalf, it appears that his remedy is either *detinue* or *trover*.

"Here is a son — a natural son it is said, who has got deeds of gift (perhaps fraudulently) of his father's property: the father having resided in the house of his son where the goods were, quits the house, and demands the goods. The goods were in his son's possession all along; at least the possession was equivocal, and that is not a case to which the writ of replevin can be applied; it must be to the case of an *unequivocal* possession, and of a *taking*;

<sup>1</sup> Ireland.

it would otherwise not be reasonable; for if there had not been a taking from the plaintiff, but that the defendant had the goods in his quiet possession by other means, the law presumes that they are *prima facie* the property of the defendant, and there is no reason why it should in such a case give a writ to change the possession in the first instance against such presumption of property. It is much fairer, to throw the *onus* on the person who has not had the possession than on him who has had it.

“On the other hand, what has been said by the defendant’s counsel would confine it too much; it is an action founded upon *any taking* by the party. The writ is founded on a taking, and the right which the party from whom the goods are taken has to have them restored to him, until the question of title to the goods is determined. The person who takes them may claim property in them, and if he does, the sheriff cannot deliver the goods until that question is tried: but that claim of property can be made only when there has been a taking: and it appears to me that the writ of replevin was calculated in such cases to supply the place of detinue or trover, and to prevent the party from whom the goods are taken, being put to those actions, except where the other can shew property. But if this writ could be thus used, I do not see why it was necessary ever to bring detinue or trover.

“I am always sorry to hear Mr. Justice Blackstone’s commentaries cited as an authority: he would have been sorry himself to hear the book so cited: he did not consider it such. His definition of the action of replevin is certainly too narrow: many old authorities will be found in the books of replevin being brought where there was no distress.

“As the practice has existed in this country, of issuing the writ in cases like the present, I shall not grant the attachment in this case, provided the goods are returned and the costs of this motion paid.”

## MATTER OF WILSONS, BANKRUPTS.

IRISH COURT OF CHANCERY. MARCH 1, 1804.

REPORTED 1 SCHOALES AND LEFROY, 320.

For replevin to lie, there must have been a wrongful taking.

A person claiming property in some corn, which was in possession of the bankrupt, and which the assignees insisted on holding as part of the bankrupt’s effects, brought a replevin, and under it took the corn from the assignees. The replevin suit proceeded;

the assignees pleaded property, and the cause was proceeding to trial, when a motion was made, in the matter of the bankrupt, by the person claiming the corn, founded upon affidavits as to the property, for an order on the assignees to deliver it up to him, and that the assignees might be restrained from compelling him to go to trial at law. Upon this motion the **Lord Chancellor** expressed his astonishment at the use made of the writ of replevin in this country;<sup>1</sup> and observed that this was not such a taking as was intended by the writ, which is merely meant to apply to this case, namely, where **A. takes goods wrongfully from B.** and B. applies to have them redelivered to him upon giving security until it shall appear whether A. has taken them rightfully. But if A. be in possession of goods, in which B. claims a property, this is not the writ to try that right; there are other actions to try the right of property. It was ordered, "That a special issue should be tried at the expense and risque of the claimant, whether the bankrupt had in his possession, at the time of his bankruptcy, the corn in question, and whether the same was the property of the petitioner, and the replevin suit to be discontinued, the claimant paying the cost thereof."

### MENNIE v. BLAKE.

IN THE QUEEN'S BENCH. 1856.

REPORTED 6 ELLIS AND BLACKBURN, 842.

For replevin to lie, there must have been an unlawful taking by fraud or violence.

Replevin. Plea: *Non cepit*. Issue thereon.

The cause came on to be tried before Crowder, J., at the last Spring Assizes for Devon. The following account of the facts which then appeared in evidence is taken from the judgment of this court.

"One Facey was indebted to the plaintiff. He brought him £15 towards payment of the debt, but requested and obtained permission to lay the money out in the purchase of a horse and cart, which were to be the property of the plaintiff, but of which Facey was to have the possession and the use, subject to such occasional use as plaintiff might require to have of them, and to their being given up to plaintiff when he should demand them. Accordingly Facey made the purchase: the possession and the use were substantially with him; he fed, stabled, and took care of the horse; there was

<sup>1</sup> Ireland.



some evidence that his name was on the front of the cart; certainly plaintiff's was on the side; under what circumstances placed there the evidence was contradictory, the plaintiff alleging it to have been placed in the ordinary way as an evidence of property, the defendant insinuating that it was so placed in order to protect it from Facey's other creditors. It is not however material, because on the one hand the plaintiff's property we take to be indisputable, and on the other we do not think there is evidence enough to charge the defendant with fraud or collusion in the circumstances under which he obtained possession, and which we now proceed to state.

"Facey determined to emigrate; and the defendant knew of his intention; but the plaintiff did not. The horse and cart were used in transporting Facey's effects to the pier at which he was to embark; and the defendant, to whom he owed money for fodder supplied to the horse, went with him to procure payment if he could; at parting Facey delivered the horse and cart to him, telling him to take them for the debt, but adding that he owed the plaintiff money also, and that, if he would discharge the debt due to the defendant, which was much less than their value, he was to give them up to him. In this manner the defendant acquired his possession. The plaintiff for some time remained in ignorance of what had passed; and afterwards, coming to the knowledge of it, demanded them; but the defendant refused to deliver them unless his debt were paid: whereupon the plaintiff proceeded to replevy the goods, and so brought the present action."

Upon these facts the learned judge directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendant or a nonsuit, if under such circumstances replevin did not lie.

Montague Smith, in the ensuing term, obtained a rule nisi accordingly.

Collier and Karslake, in last Hilary Term, showed cause. [Argument omitted.]

Montague Smith and Coleridge, *contra*. [Argument omitted.]  
*Cur. adv. vult.*

Coleridge, J., now delivered judgment. "This was a rule to enter a nonsuit or verdict for the plaintiff on a plea of *non cepit* to a declaration in replevin." His lordship then stated the facts as *ante*, p. 843, and then proceeded as follows:—

"Upon these facts the question raised is, Whether there was any taking of the horse and cart from the plaintiff by the defendant?

And we are of opinion, looking to the nature and purpose of the action of replevin, that there was no taking in the sense in which that word must be understood in this issue. The whole proceeding of replevin at common law, is distinguished from that in trespass in this, among other things; that, while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of the plaintiff, the object of the former is to procure the restitution of the goods themselves; and this it effects by a preliminary *ex parte* interference by the officer of the law with the possession. This being done, the action of replevin, apart from the replevin itself, is again distinguished from trespass by this, that, at the time of declaring, the supposed wrongful possession has been put an end to, and the litigation proceeds for the purpose of deciding whether he, who by the supposition was originally possessed, and out of whose possession the goods were taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to the defendant. Blackstone (3 Com. 146), after observing that the Mirror ascribes the innovation of this proceeding to Glanvil, says that it 'obtains only in one instance of an unlawful taking, that of a wrongful distress.' If by this expression he only meant that in practice it was not usual to have recourse to replevin except in the case of a distress alleged to be wrongful, he was probably justified by the fact. But there are not wanting authorities to show that the remedy by replevin was not so confined; and in the case of *Shannon v. Shannon* [1 Sch. & Lef. 324, 327], Lord Redesdale finds fault with this passage, saying that the definition is 'too narrow,' and that 'many old authorities will be found in the books of replevin being brought when there was no distress': and the learned reporters, in a note to the passage, refer to Spelman's Glossary, 485 (tit. Replegio); *Doctrina Placitandi*, Replevin, 313; *Com. Dig.* Replevin (A); and Gilbert, *Distress and Replevin*, 58 (4th ed. p. 80).

"There is no doubt that passages, such as those referred to, may be found stating the definition very broadly; yet we believe that, when the authorities on which some of them rest are examined, and when due attention has been paid to the context in others, it will appear in the result questionable, at the least, whether the commentator's more qualified definition was not correct; at least that replevin was instituted as a peculiar remedy, and under the statute of Marlbridge, by plaint as a *festinum remedium* for the injury of an unlawful distress.

"Thus in 2 Roll. Abr. 430, Replevin (B) 2, it is said, if trespasser

take beasts, replevin lies of this taking at election; the authority for this is Yearb. Mich., 7 Hen. IV. fol. 28 B; where, the counsel, or another judge, alleging the contrary, Gascoigne [C. J. of K. B.] says, 'He may elect to have replevin or writ of trespass;' but he adds, or the reporter adds, 'and some understand that he cannot,' for which last a reason is given.

"Again, Com. Dig. Replevin (A), 'Replevin lies of all goods and chattels unlawfully taken;' for this no authority is cited; but the context shows that the Chief Baron was thinking, not so much of the circumstances under which taken, as of the things themselves; for he adds, 'whether they be live cattle, or dead chattels,' or 'a swarm of bees,' or 'iron of his mill,' citing Fitzherbert's *Natura Brevium*, in whose chapter on replevin we do not find the law so broadly laid down. As to the passage to which reference is made in Lord Chief Baron Gilbert, it should be remembered that the treatise is on the law of distresses and replevins, and the passage occurs in a chapter in which replevin is treated of with reference to distress, as if the two formed parts of one subject-matter. Little therefore can be inferred from the generality of the language in a single sentence. A dictum of Lord Ellenborough has also been referred to in *Dore v. Wilkinson*, 2 Stark. N. P. C. 287, from which the inference is that he thought replevin might conveniently be had recourse to more often than it was, instead of bringing trover; but it was an observation thrown out in the course of a cause, a recollection of what Mr. Wallace used to say, not ruling any point, nor deciding anything in the cause; much importance ought not to be attached to such casual observations, even of so great a judge, at *Nisi Prius*. On the other hand, Lord Coke seems to be authority the other way. In Co. Lit. 145 *b*, is the following passage: 'A replegiare lyeth, as Littleton here teacheth us, where goods are distrained and impounded, the owner of the goods may have a writ *de replegiare facias*, whereby the sheriff is commanded, taking sureties in that behalf, to redeliver the goods distrained to the owner, or upon complaint made to the sheriff he ought to make a replevy in that county. Replegiare is compounded of re and plegiare, as much as to say, as to redeliver upon pledges or sureties.'

"From a review of these and other authorities which might be added, it may appear not settled whether originally a replevy lay in case of other takings than by distress. Nor is it necessary to decide that question now; for, at all events, it seems clear that replevin is not maintainable unless in a case in which there has been first a taking out of the possession of the owner. This stands

upon authority and the reason of the thing. We have referred already to a dictum of Lord Redesdale. Three cases are to be found: *Ex parte Chamberlain* [1 Sch. & Lef. 320], *In re Wilsons* [1 Sch. & Lef. 320, note *a*], and *Shannon v. Shannon* [1 Sch. & Lef. 324], in which the law is so laid down by Lord Redesdale. And these are cases of great authority; for that very learned judge found the practice in Ireland the other way. He felt the inconvenience and injustice of it: he consulted with the Lord Chief Justice and obtained the opinion of the other judges, and then pronounced the true rule, which, in one of these cases, *In re Wilsons* [*supra*], he thus states: The writ of replevin 'is merely meant to apply to this case (namely), where A. takes goods wrongfully from B. and B. applies to have them redelivered to him upon giving security until it shall appear whether A. has taken them rightfully. But if A. be in possession of goods, in which B. claims a property, this is not the writ to try that right.' In the course of these cases his Lordship points out how replevin proceeds against the general presumption of law in favor of possession; how it casts upon him who was in possession the burden of first proving his right; and he puts (*Ex parte Chamberlain* [1 Sch. & Lef. 322]), as a *reductio ad absurdum*, a case not unlike the present. 'Suppose,' says he, 'the case of a person having a lien on goods in his possession, and who insists on being paid before he delivers them up; I do not see on the principles insisted on, why a writ of replevin may not issue in that case.' The reason of the thing is equally decisive: as a general rule it is just that a party in the peaceable possession of land or goods should remain undisturbed, either by the party claiming adversely or by the officers of the law, until the right be determined and the possession shown to be unlawful. But, where, either by distress or merely by a strong hand, the peaceable possession has been disturbed, an exceptional case arises; and it may be just that, even before any determination of the right, the law should interpose to replace the parties in the condition in which they were before the act done, security being taken that the right shall be tried, and the goods be forthcoming to abide the decision. Whatever may be thought of Lord Coke's etymology, what he says of replegiare, while it shows his understanding of the law, gives a true account of **what** replevin is, a redelivery to the former possessor on pledges found. But this is applicable clearly to exceptional cases only. If, wherever a party asserts a right to goods in the peaceable possession of another, he has an election to take them from him by a replevin, it is obvious that the most crying injustice might not unfrequently result. Now, in the present case,

Facey was not the servant of the plaintiff; nor was his possession merely the possession of the plaintiff; he was the bailee of the plaintiff, and had a lawful possession from the delivery of the owner, which conferred on him a special property. This did not authorize him to transfer his possession to the defendant; nor could he give him a lien for his debt against the paramount right of the true owner the bailor; after a demand and refusal, upon the admitted facts in this case, the plaintiff could clearly have maintained trover against the defendant; but yet there was nothing wrongful in his accepting the possession from Facey; he acquired that possession neither by fraud nor violence; at least none is found, and we cannot presume either; and he retained the possession on a ground which might justify the retainer until the alleged ownership was proved. This therefore, in our opinion, was a case in which the plaintiff could not proceed by replevin, but should have proved his prior right in trover or detinue. .

"The rule should be absolute; not to enter a verdict, but a nonsuit."

Rule absolute for a nonsuit.<sup>1</sup>

### JAMES DUGAN *v.* DANIEL A. NICHOLS.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1878.

REPORTED 125 MASSACHUSETTS, 576.

Replevin lies for a wrongful detention merely.

Replevin of 13 barrels of oil. Writ dated July 10, 1874.

The plaintiff offered evidence tending to prove that he bought the oil of the firm of Shaw & Bruce, of which the defendant was the assignee in bankruptcy, and paid for the same; and that the oil was, when purchased, in a shed belonging to the firm, where it remained until it was replevied. The plaintiff also offered evidence tending to prove a demand of the defendant before the date of the writ.

The defendant testified that he found the oil in question on the premises of Shaw & Bruce; that he never heard that the oil belonged to the plaintiff, until the plaintiff told him so about a week before the date of the writ; and that the plaintiff never made any demand upon him, and upon cross-examination, in reply to the question, "If you had understood Dugan demanded the oil, should

<sup>1</sup> Arguments of counsel and part of the opinion in criticism of the fact that the sheriff's deputy for the issuing of replevins was the plaintiff's attorney are here omitted.

you have given it up?" answered, "I should not, unless my counsel had ordered me to." Upon examination ~~he testified that he~~ had no recollection that the question of what he might have done had ever entered his mind until he was asked the question as above.

The defendant requested the judge to rule that it was not a question of what the defendant now thought he might have done; that if the defendant's testimony was taken as true, it would not exempt the plaintiff from making a demand before bringing his action; and that there was no evidence of a conversion. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. Sewwall, for the defendant.

S. B. Ives, Jr., for the plaintiff, was not called upon.

By the Court. The testimony of the defendant warranted the jury in finding an unlawful detention of the goods, which was all that was necessary to support replevin. Gen. Sts. c. 143, § 10; *Whitman v. Merrill*, 125 Mass. 127.<sup>1</sup>

Exceptions overruled.<sup>2</sup>

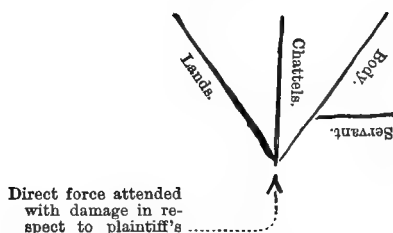
"When any goods exceeding in value twenty dollars, are unlawfully taken or detained from the owner or person entitled to the possession, or when any goods of that value attached on mesne process or taken on execution are claimed by a person other than the defendant in the suit, in which they are so attached or taken, such owner or other person may cause them to be replevied." General Statutes, Massachusetts, c. 143, § 10.

<sup>1</sup> Part of the opinion is omitted.

<sup>2</sup> Per Lord, J., in *Whitman v. Merrill*, 125 Mass. 127: "A fallacy of the plaintiff's is the assumption that a judgment for the plaintiff in replevin necessarily implies an unlawful taking of the replevied goods by the defendant. This is not so. Replevin lies for an unlawful detention, although the original taking was lawful." *Badger v. Phinney*, 15 Mass. 359 (1819); *Baker v. Fales*, 16 Mass. 147 (1819); *Marston v. Baldwin*, 17 Mass. 606 (1822); *Esson v. Tarbell*, 9 Cush. 407 (1852); *Lathrop v. Bowen*, 121 Mass. 107 (1876); cf. *Bemis v. De Land*, 177 Mass. 182 (1900), accord.

## SECTION IV.

## TRESPASS.



We have thus far considered (1) an action for the recovery of one's debt (almost, indeed, for the specific coins of one's debt); (2) for the recovery of one's specific chattels, rightfully taken and wrongfully detained (or, in later law, perhaps, wrongfully taken); (3) for the recovery of one's specific chattels (cattle) wrongfully taken. The first very indirectly seeks, the second and third directly seek, personal property of which the plaintiff is being unlawfully deforced. They have one important thing in common — an ancestry not traceable to the criminal law. (Though replevin certainly has a criminal tinge at its origin.)<sup>1</sup>

<sup>1</sup> "Just because the power of extra-judicial distress is originally a justiciary power, the king's courts and officers are much concerned when it is abused. If the distrainer will not deliver the beasts after gage and pledge have been offered, then it is the sheriff's duty to deliver them. For this purpose he may raise the hue, call out the whole power of the county (*posse comitatus*) and use all necessary force. 'When gage and pledge fail, peace fails,' says Bracton; in other words, the distraining lord is beginning a war against the state and must be crushed. The offence that he commits in retaining the beasts after gage and pledge have been tendered, is known as *vetitum namii*, or *vee de nam*. It stands next door to robbery; it is so royal a plea, that very few of the lords of franchises have power to entertain it. It is an attack on that judiciary system of which the king is the head. Disputes about the lawfulness of a distress were within the sheriff's competence. He could hear them without being ordered to do so by royal writ. But when he heard them he was acting, not as the president of the county court, but as a royal justiciar. Before the end of the thirteenth century the action based upon the *vee de nam* was losing some of its terrors; either party could easily procure its removal from the county court to the king's court. Under the name of Replegiare or Replevin an action was being developed which was proving itself to be a convenient action for the settlement of disputes between landlord and tenant; but it seems to have owed its vigor, its rapidity, and therefore its convenience, to the supposition that a serious offence had been committed against the king." 2 Pollock and Maitland, 575.

The trespasses, if we except trespass *quare clausum fregit*, are of criminal ancestry. We shall trace their genealogy, showing how certain criminal processes called appeals finally evolved into indictments on the one hand, and into actions for civil torts on the other. And finally we shall note that one essential of trespass is a direct force to the plaintiff's lands, his chattels, his body, or his servant,<sup>1</sup> to be compensated by money damages. It is interesting to note that in some of the United States, certain trespasses to land are to-day by statute crimes as well as torts.

## HISTORY OF TRESPASS.

PRESENTED 2 POLLOCK AND MAITLAND, 510.

Anciently, trespasses or wrongful acts were	{	Felonies to be prosecuted by appeal.
		Mere trespasses giving rise to actions in which no words of felony were used.
Later, offences less than felony were punished	{	a. In civil actions.
		b. Upon presentment before local courts.
		c. Upon presentment before the king's justices.
In later days, offences were punishable	{	Upon indictment.
		Upon summary conviction.
		{ Treasons. Felonies. Misdemeanors.

“‘*Trespasse.*’ *Transgressio derivatur à transgrediendo*, because it passeth that which is right: *Transgressio autem est, cum modus non servatur, nec mensura: debet enim quilibet in suo facto modum habere, et mensuram.* Nota, in the lowest and the highest offences there are no accessaries, but all are principals; as in ryots, routs, forcible entries, and other transgressions *vi et armis*, which are the lowest offences; and so in the highest offence, which is *crimen læsæ majestatis*, there be no accessaries; but in felonies there be accessaries both before and after.” Coke upon Littleton, 57 a.

Trespass “became common near the end of Henry III.’s reign. It was a flexible action; the defendant was called upon to say why

<sup>1</sup> In the following pages separate treatment of trespass *per quod servitium amisit* has been deemed unnecessary. — ED.



with force and arms and against the king's peace he did some wrongful act. In course of time the precedents fell into three great classes; the violence is done to the body, the lands, the goods of the plaintiff." 2 Pollock and Maitland, 165.

#### A. *The Genesis of Trespass to Plaintiff's Person.*

"It is commonly known that the early forms of legal procedure were grounded in vengeance. Modern writers have thought that the Roman law started from the blood feud, and all the authorities agree that the German law begun in that way. The feud led to the composition, at first optional, then compulsory, by which the feud was bought off. The gradual encroachment of the composition may be traced in the Anglo-Saxon laws, and the feud was pretty well broken up, though not extinguished, by the time of William the Conqueror. The **killings** and **house burnings** of an earlier day became the appeals of mayhem and arson. . The appeals *de pace et plagis* and of mayhem became, or rather were in substance, the action of trespass which is still familiar to lawyers." Holmes, Common Law, 2.

#### DE APPELO DE PACE ET PLAGIS.

REPORTED BRACTON, F. 144.

"The appeal is made in these words. 'A. appeals B. that on a certain day, as he was in the peace of the lord the king in such a place, or as he travelled in the peace of the lord the king on the highway of the lord the king between such a vill and such a vill, on such a day, before such a feast or after such a feast, in such a year, at such an hour, the said B. came with his force and against the peace of the king in felony and with a premeditated assault, made an attack upon him, and inflicted a certain wound upon him in such a place, with such kind of arms, and that he did this wickedly and in felony, he offers to prove against him by his body, as the court thinks fit.' And B. comes and defends himself against having broken the peace of the king, and against the felony and the wound, and whatever is against the peace of the lord the king (and the whole record word for word, whatever is imputed to him and according to what is imputed to him), by his body according as the court of the king has thought fit."

## APPEAL OF MAYHEM.

“Umberd, who is here, appeals Maimound who is there, for that whereas, etc., there came this Maimound running in forethought assault and with such manner of arms cut off the foot or the hand of this Umberd, or with such a staff struck him on the head, so that he broke the crown of his head, or with a stone knocked out three of his front teeth so that he maimed him. This mayhem did he feloniously,” etc. — Mirror (Sel. Soc.), Book 2, c. xix.

“Mayhem is so termed when any one is rendered in any part of his body disabled from fighting, and chiefly by him whom he appeals, as if portions of bone shall have been extracted from his head, and a great crust is raised. Likewise if a bone be broken, or a foot, or a hand, or a finger, or a joint of a foot or of a hand, or any other member be cut off, or the nerves or some limb have become contracted by the wound so made, or the fingers have been rendered crooked, or if an eye has been scooped out, or anything else has been done to the body, whereby a man has been rendered less able and competent to defend himself. But what shall be said of him who has his teeth broken? if the breakage of teeth is to be adjudged a mayhem? To which it is to be answered, that everything whereby a man is disabled from fighting as above said, is a mayhem.” Bract. f. 145 b.

## THE CHARACTERISTICS OF TRESPASS TO PLAINTIFF'S PERSON.

GREEN *v.* GODDARD.

IN THE QUEEN'S BENCH. BETWEEN 1703 AND 1705.

REPORTED 2 SALKELD, 641.

The essence of trespass.

Trespass, assault, and battery laid on the first of October, 3 *reg.* The defendant, as to the *vi et armis*, pleaded *non cul.* And as to the residue says, that long before, namely, on the 13th of September, a stranger's bull had broke into his close, that he was driving him out to put him in the pound, and the plaintiff came into the said close, *et manu forti impedivit ipsum ac taurum præd. recussisse voluit, et quod ad præveniend. etc. ipse idem defend. parvum flagellum super querentem molliter imposuit, quod est idem residuum, etc., absque hoc quod cul. fuit ad aliquod tempus ante eundem 13 diem.* The plaintiff demurred. Mr. Eyre, for the plaintiff, argued

that they should have requested him to go out of the close. 19 Hen. VI. 31; 11 Hen. VI. 23; 2 Ro. Tresp. 547, 548, 549, and that *flagellum molliter imponere* is repugnant. 1 Sid. 4. *Et per Cur.* There is a force *in law*, as in every trespass *quare clausum fregit*: As if one enters into my ground, in that case the owner must request him to depart before he can lay hands on him to turn him out; for every *impositio manuum* is an assault and battery, which cannot be justified upon the account of breaking the close in law, without a request. The other is an actual force, as in burglary, as breaking open a door or gate; and in that case it is lawful to oppose force to force; and if one breaks down the gate, or comes into my close *vi et armis*, I need not request him to be gone, but may lay hands on him immediately, for it is but returning violence with violence: So if one comes forcibly and takes away my goods, I may oppose him without any more ado, for there is no time to make a request.<sup>1</sup>

### UNDERWOOD v. HEWSON.

IN THE KING'S BENCH. 1724.

REPORTED 1 STRANGE, 596.

The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him: and at the trial it was held that the plaintiff might maintain trespass. Strange, *pro defendente*.

### COLE v. TURNER.

BEFORE HOLT, C. J., AT NISI PRIUS. 1704.

REPORTED 6 MODERN, 149.

Battery defined.

Upon evidence in trespass for assault and battery:

Holt, C. J., declared, 1. That the least touching of another in anger is a battery.

2. If two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery.

3. If any of them use violence against the other, to force his way in a rude inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt, will be a battery. *Vide* Bro. Tresp. 236, 336; 7 Edw. IV. 26; 22 Ass. 60; 3 Hen. IV. 9.

<sup>1</sup> Part of the case, not here relevant, is omitted.

Note. It was in action of battery by husband and wife, for a battery upon the husband and wife, *ad damnum ipsorum*; and though the plaintiff had a verdict, yet the Chief Justice said, he should never have judgment: and the judgment was after arrested above upon that exception.

### STEPHENS *v.* MYERS.

AT NISI PRIUS. 1830.

REPORTED 4 CARRINGTON AND PAYNE, 349.

Assault defined.

Assault. The declaration stated, that the defendant threatened and attempted to assault the plaintiff. Plea — Not guilty.

It appeared, that the plaintiff was acting as chairman, at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being about six or seven persons between him and the plaintiff. The defendant having, in the course of some angry discussion, which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made, that he should be turned out, which was carried by a very large majority. Upon this, the defendant said, he would rather pull the chairman out of the chair, than be turned out of the room; and immediately advanced with his fist clenched toward the chairman, but was stopped by the church-warden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman; but the witnesses said, that it seemed to them that he was advancing with an intention to strike the chairman.

Spankie, Serjt., for the defendant, upon this evidence, contended, that no assault had been committed, as there was no power in the defendant, from the situation of the parties, to execute his threat — there was not a present ability — he had not the means of executing his intention at the time he was stopped.

Tindal, C. J., in his summing up, said: It is not every threat, when there is no actual personal violence, that constitutes an assault, there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopped; then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault

in law. If he was so advancing that within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages, as you think the nature of the case requires.

Verdict for the plaintiff. Damages, 1s.

Andrews, Serjt., and Steer, for the plaintiff.

Spankie, Serjt., and Thesiger, for the defendant.

### TURBERVELL *v.* SAVADGE.

IN THE KING'S BENCH. 1669.

REPORTED 2 KEBLE, 545.

Dictum. The intent may be material in trespass.

In trespass of assault, battery, and wounding, the defendant pleaded the plaintiff began first, and the stroke he received, whereby he lost his eye, was on his own assault, and in defence of the defendant; and on trial at bar now by the evidence it appeared the plaintiff threatened the defendant, and said, were it not Assize time, he would tell more of his mind, which was said bending his fist, and with his hand on his sword, yet *per Curiam* this is no assault, as it would be without that declaration; but it was farther sworn the plaintiff with his elbow punched the defendant, which if done in earnest discourse, and not with intent of violence, is no assault, nor then is it a justification of battery after retreat, as Phineas Andrew's case, and the jury, not believing the defendant, found *pro* plaintiff and £500 damages.<sup>1</sup>

### MITCHIL *v.* ALESTREE.

IN THE KING'S BENCH. 1676.

REPORTED 1 VENTRIS, 295.

An injury which happens against the defendant's will may be a trespass.<sup>2</sup>

In an action upon the case brought against the defendant, for that he did ride an horse into a place called Lincoln's Inn Fields, a place much frequented by the king's subjects, and unapt for such

<sup>1</sup> *Sed quære.* Cf. Scott *v.* Shepard, reported *post*.

<sup>2</sup> Cf. Gibbons *v.* Pepper, reported *post*.

purposes) for the breaking and taming of him, and that the horse was so unruly, that he broke from the defendant, and ran over the plaintiff, and grievously hurt him, to his damage, etc.

Upon not guilty pleaded, and a verdict for the plaintiff, it was moved by Simpson in arrest of judgment, that here is no cause of action; for it appears by the declaration, that the mischief which happened was against the defendant's will, and so *damnum absque injuria*; and then not shown what right the king's subjects had to walk there; and if a man digs a pit in a common into which one that has no right to come there, falls in, no action lies in such case.

*Curia contra*, it was the defendant's fault, to bring a wild horse into such a place where mischief might probably be done, by reason of the concourse of people. Lately, in this court an action was brought against a butcher, who had made an ox run from his stall and gored the plaintiff; and this was alleged in the declaration to be in default of penning of him.

Wylde said: If a man hath an unruly horse in his stable, and leaves open the stable-door, whereby the horse goes forth and does mischief; an action lies against the master.

Twisden. If one hath kept a tame fox, which gets loose and grows wild, he that kept him before shall not answer for the damage the fox doth after he hath lost him, and he hath resumed his wild nature. *Vide* Hobart's Reports, 134. The case of Weaver and Ward. Judgment for the plaintiff. 2 Lev. 172.

*affirmed.*

### WEAVER v. WARD.

IN THE KING'S BENCH. 1616.

REPORTED HOBART, 134.

Trespass, unlike felony, need not be done *animo felonico*.

Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded that he was amongst others, by the commandment of the lords of the council, a trained soldier in London, of the band of one Andrews, captain; and so was the plaintiff; and that they were skirmishing with their muskets charged with powder for their exercise in *re militari*, against another captain and his band; and as they were so skirmishing, the defendant, *casualiter et per infortunium et contra voluntatem suam*, in discharging his piece, did hurt and wound the plaintiff; which is the same, etc., *absque hoc*, that he was guilty *aliter sive alio modo*. And upon demurrer, by the plaintiff, judgment was given for him;

for though it were agreed, that if men tilt or tourney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico*; yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man, he shall be answerable in trespass, (for this is in the nature of an excuse, and not of justification, *prout ei bene licuit*,) except it may be judged utterly without his fault; as if a man by force take my hand and strike you; or if here the defendant had said that the plaintiff ran cross his piece when it was discharging; or had set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.

(b) *The Genesis of Trespass to Plaintiff's Goods.*

In the very early English law, "The typical action for the recovery of a movable is a highly penal action; it is an action against a thief, or at any rate it is an action which aims at the discovery and punishment of a thief as well as at the restitution of stolen goods. An action we call it, but it is a prosecution, a prosecution in the primary sense of that word, a pursuit, a chase; a great part of the legal procedure takes place before any one has made his way to a court of law. My cattle have been driven off; I must follow the trail; it is the duty of my neighbors to assist me, to ride with me. If we catch the marauder still driving the beasts before him, we take him as a 'hand having' thief and he is dealt with in an exceedingly summary fashion; 'he cannot deny' the theft. The practice of ear-marking or branding cattle, the legal duty that I am under of publicly exposing to the view of my neighbors whatever cattle I have, makes it a matter of notoriety that these beasts, which this man is driving before him, have been taken from me. Even if we cannot catch a thief in the act, the trail is treated as of great importance. If it leads into a man's land, he must show that it leads out again, otherwise it will 'stand instead of a foreoath'; it is an accusing fact. If the possessor has no unbroken trail in his favor, then when he discovers the thing, he lays his hand upon it and claims it. He declares the ox to be his and calls upon the possessor to say how he came by it. The possessor has to give up the thing or to answer this question. He may perhaps assert that the beast is his by birth and rearing; a commoner answer will be that he acquired it from a third person whom he names. Then the pur-

suer with his left hand grasping one of the beast's ears, and his right upon a relic or a sword, swears that the beast is his and has been stolen from him, and the possessor with his left hand grasping the other ear swears that he is naming the person from whom he acquired it.

"Now at length there may be proceedings before a court of law. The possessor must produce this third person before the court; he has vouched a warrantor and must find him. If this vouchee appears and confesses the warranty, then the beast is delivered over to him and the accusation is made against him. He can vouch another warrantor, and so, by following backwards the course along which the beast has passed, we may come at length to the thief. . . . If the possessor can name no warrantor, it is still possible that he should protect himself against the charge of theft by showing that he purchased the thing in open market before the proper witnesses; but he will have to surrender that thing; it is not his though he bought it honestly. .

"In the thirteenth century this ancient procedure was not yet obsolete; but it was assuming a new form, that of the appeal of larceny. Bracton called it the *actio furti* . . .

"Now this old procedure, which is Glanvill's *petitio rei ex causa furtiva* and Bracton's *actio furti*, underwent a further change. The appellee against whom a charge of larceny was brought was expected, if he would not fight, to put himself upon his country. This we may regard as a concession to appellees. The accused had no longer to choose between some two or three definite lines of defence; he could submit his case as a whole to the verdict of his neighbors, and hope that for one reason or another — which reason they need not give — they would acquit him. The voucher of a warrantor disappeared, and with it the appellor's chance of recovering his goods from a hand which was not that of the thief. Men were taking more notice than they once took of the psychical element of theft, the dishonest intention, and it was no longer to be tolerated that a burden of disproving theft should be cast upon one against whom no more could be asserted than that he was in possession of goods that had been taken from another. The appeal had become simply a criminal prosecution; it failed utterly if the appellee was not convicted of theft. If he was convicted, and the stolen goods had been seized by the king's officers, the appellor might, as of old, recover them; a writ of restitution would be issued in his favor, if he proved that he made 'fresh suit.' But more and more this restitution is regarded as a mere subordinate incident in the appeal, and when it is granted, it is granted rather as a reward



and a favor than as a matter of strict right. The man who has been forward in the prosecution of a malefactor deserves well at the hands of the State; we reward him by giving him his own. In order to explain this view of the matter we must notice that our law of forfeiture has been greedy. The felon forfeits his chattels to the king; he forfeits what he has; he forfeits even 'that which he seemeth to have.' If the thief is indicted and convicted, the king will get even the stolen goods; if he is appealed then the appellor will perhaps, if he has shown himself a diligent subject, receive a prize for good conduct. Men will begin to say that the thief has 'property' in the stolen goods and that this is the reason why the king takes them. As a matter of history we believe this to be an inversion of logic:—one of the reasons why the thief is said to have 'property' in those goods is that the king has acquired a habit of taking them and refusing to give them up.

"But of course more than this must be said before we can understand the ascription of property to a thief or other wrongful taker. So long as the old practice of bringing an *actio furti* against the third hand was in use, such an ascription would have been impossible. As already said, that practice went out of use. The king's court was putting something in its place, and yet not exactly in its place, namely, a writ of trespass. This became common near the end of Henry III.'s reign. It was a flexible action; the defendant was called upon to say why with force and arms and against the king's peace he did some wrongful act. In the course of time the precedents fell into three great classes: the violence done to the body, the lands, the goods of the plaintiff. The commonest interference with his goods is that of taking and carrying them away; a well-marked sub-form of trespass, is trespass *de bonis asportatis*. If, however, we look back at the oldest precedents we shall see that the destruction or asportation of goods was generally complained of as an incident which aggravated the invasion of land, the entry and breach of a close, and this may give us a clew when we explore the remedy which this action gives.

"It is a semi-criminal action. The procedure against a contumacious defendant aims at his outlawry. The convicted defendant is imprisoned until he makes fine with the king. He also is condemned to pay damages. The action is not recuperatory; it is not *rei persecutoria*. . . . To have made the action recuperatory (*rei persecutoria*) in the case of chattels, would have been an anomaly; in Henry III.'s day it might even have been an improper interference with the old *actio furti*; but at any rate it would have been an anomaly. Therefore the man whose goods have been taken away

from him can by writ of trespass recover, not his goods, but a pecuniary equivalent for them; and the writ of trespass is beginning to be his one and only remedy unless he is hardy enough to charge the defendant with larceny.

"This is not all. Whatever subsequent ages may think, an action of *trespass de bonis asportatis* is not an action that should be brought against the third hand, against one who has come to the goods through or under the wrongful taker, or against one who has wrongfully taken them from him. The man who has bought or hired goods from the trespasser, how has he broken the king's peace and why should he be sent to jail? As to the second trespasser, the action *de bonis asportatis* would have fallen out of touch with its important and influential neighbor the action *de clauso fracto*, if it could have been brought against any one but the original wrong-doer. If I am disseised of land and any one disseises my disseisor, a writ of trespass is not my remedy against him; I want land, not money, and a proper action is provided for me. It would be an anomaly to suffer the writ of trespass to do for the disseisee of a chattel what it will not do for the disseisee of land. The mischief is that the two cases are not parallel. The disseisee of land has plenteous actions though the writ of trespass be denied him, while the disseisee of a chattel, when the barbaric *actio furti* was falling into oblivion, had none. And so we arrive at this lamentable result which prevails for a while:—If my chattel be taken from me by another wrongfully but not feloniously, then I can have no action against any third person who at a subsequent time possesses it or meddles with it; my one and only action is an action of trespass against the original taker." 2 Pollock and Maitland, 156-158, 163-166.

#### APPEAL OF LARCENY (*Actio Furti*):

"Athelwold, who is here, appeals Osketil, who is there, for that whereas this Athelwold had his goods, and in particular, etc., these goods he (Osketil) stole from him larcenously as a larcener, etc." Mirror (Sel. Soc.), Book 2, c. xvi.

#### APPEALS OF ROBBERY.

"Osmund, who is here, appeals Saxmund, who is there, for that whereas this Osmund had a horse of such a price, there came this Saxmund and robbed him of the horse on such a day, etc., or of so much money, or of such a garment of such a price, feloniously,

X

etc., or of his two oxen of such a price, or of such other kind of chattels of such a price, etc., or received the said goods thus taken in robbery, or was aiding or otherwise consenting." Mirror (Sel. Soc.), Book 2, c. xvi.

("In these actions, two rights may be concerned—the right of possession, as is the case where a thing is robbed or stolen from the possession of one who had no right of property in it (for instance where the thing has been lent, bailed, or let); and the right of property, as is the case where a thing is stolen or robbed from the possession of one to whom the property in it belongs.") Mirror (Sel. Soc.), Book 2, c. xvi.

"John, who is here, appeals Peter, who is there, that whereas the same John on such a day in such a year had such a horse, which he kept in his stable, or elsewhere in such certain place; the same Peter there came, and the same horse feloniously as a felon stole from him, and took and led away against the peace, and that this he wickedly did, the same John offers to prove by his body as the court shall award that he ought to do it." <sup>1</sup> Britton, 96. Nichols, Ed.

## TRESPASS HOW FAR THE DISSEISIN OF A CHATTEL.

Clearly to understand the ancient action of trespass for the asportation of goods, we must know something of the whole scheme of remedies for the disseisin of chattels. The action of trespass *de bonis asportatis* is, as has been observed, of criminal origin. The barbarous *actio furti* of ancient times, and the appeals of larceny and robbery of more recent date, are its ancestors. As in the case of trespass *de bonis asportatis*, and in the cases of the *actio furti* and the appeals, the fundamental wrong was a taking without right of the plaintiff's chattel,<sup>2</sup> — a disseisin of the plaintiff's chattel.<sup>3</sup> "From the days of Glanvil[1] almost to the time of Littleton, 'seisin' and 'possession' were synonymous

<sup>1</sup> "If Peter pleads that the horse was his own, and that he took him as his own, and as his chattel lost out of his possession, and can prove it, the appeal shall be changed from felony to the nature of a trespass."

<sup>2</sup> "Originally any taking without right, like killing by accident, was felonious. In Bracton's time, if not earlier, the *animus furandi* was essential to a felony. Bracton, f. 136 b." Ames, Disseisin of Chattels, 3 Harv. L. Rev. 28, n.

<sup>3</sup> Ibid. 23, 28.

terms, and were applied alike to chattels and land. In a word, seisin was not a purely feudal notion.”<sup>1</sup> “The word ‘disseisin,’ it is true, was rarely used with reference to personalty.<sup>2</sup> Only three illustrations of such use have been found.<sup>3</sup> . . . In substance, however, the law of disseisin was common to both realty and personalty.”

#### THE DISSEISIN OF LAND.

“A disseisor of land, it is well known, gains by his tort an estate in fee simple. ‘If a squatter wrongfully encloses a bit of waste land and builds a hut on it, and lives there, he acquires an estate in fee simple in the land which he has enclosed. . . . He is not a mere tenant at will, nor for years, nor for life, nor in tail; but he has an estate in fee simple. He has seisin of the freehold to him and his heirs.’”<sup>4</sup>

#### THE DISSEISIN OF CHATTELS.

“Compare with this the following from Fitzherbert: ‘Note if one takes my goods, he is seised now of them as of his own goods, adjudged by the whole court.’”<sup>5</sup>

#### THE EFFECT UPON TITLE OF TRESPASS TO GOODS.

##### (a) *The Ancient Rule.*

This prepares us for the following statement, which is startling: “Trespass in goods is the wrongful taking of them with pretence of title, *and therefore altereth the propertie of those goods.*” Finch, Law, Book III. c. 6.

#### QUE SERA DIT LE TRESPASSER.

##### 2 ROLL. ABR. TRESPASS, 553.

Trespass anciently altered the property in goods.

1. If my servant without my notice puts my beasts on the land of another, my servant is the trespasser and not I; for by the voluntary putting of the animals there without my assent, he gains

<sup>1</sup> Ames, Disseisin of Chattels, 3 Harv. L. Rev. 23.

<sup>2</sup> Ibid. 24.

<sup>3</sup> Ibid. 24; 1 Rot. Cur. Reg. 451; 1 Stat. of Realm, 230, or Bract. f. 136 b; Y. B. 14 Edw. II. 409.

<sup>4</sup> Ames, Disseisin of Chattels, 3 Harv. L. Rev. 23, citing the quoted matter from Williams, Seisin, 7. See also Leach v. Jay, 9 Ch. Div. 42, 44, 45.

<sup>5</sup> See Ames, Disseisin of Chattels, 3 Harv. L. Rev. 24.

a special property for the time, and thus for this purpose they are his animals. 12 Hen. VII. Kell. 3 b.

2. But, it seems, if my wife puts my beasts on the land of another, I myself am the trespasser, for that my <sup>1</sup> wife is not able to gain a property from me.

"The legal effects of the disseisin of chattels are most vividly seen by looking at the remedies for a wrongful taking. The right of recaption was allowed only *flagrante delicto*. This meant in Britton's time the day of the taking. If the owner retook his goods afterwards, he forfeited them for his 'usurpation.' If the taking was felonious, the despoiled owner might bring an appeal of larceny, and by complying with certain conditions [stated below in cases there presented] obtain restitution of the stolen chattel. But such was the rigor and hazard of these conditions, that from the middle of the thirteenth century the appeal was largely superseded by the new action of trespass.<sup>2</sup> If the taking was not criminal, trespass was for generations the only remedy.

"Trespass, however, was a purely personal action; it sounded only in damages. The wrongful taking of chattels was, therefore, a more effectual disseisin than the ouster from land. The dispossessed owner of land, as we have seen, could always recover possession by an action. Though deprived of the *res*, he still had a right *in rem*. The disseisor acquired only a defeasible estate. One whose chattel had been taken from him, on the other hand, having no means of recovering it by action<sup>3</sup> [Replevin being anciently confined to cases of wrongful distress and detainue to cases of wrongful detainer after rightful taking, not only lost the *res*, but had no right *in rem*. The disseisor gained by his tort both the possession and the right of possession; in a word, the absolute property in the chattel taken.

"What became of the chattel afterwards, therefore, was no con-

<sup>1</sup> The word "le," which occurs in the original, should be "mon" to accord with the first use of the phrase, "Mes semble si mon feme," etc.

<sup>2</sup> "A case of the year 1199 (2 Rot. Cur. Reg. 34) seems to be the earliest reported instance of an action of trespass in the royal courts. Only a few cases are recorded during the next fifty years. But about 1250 the action came suddenly into great popularity. In the *Abbreviato Placitorum*, twenty-five cases are given of the single year 1252-1253. We may infer that that writ, which had before been granted as a special favor, became at that time a writ of course. In Britton (f. 49), pleaders are advised to sue in trespass, rather than by appeal, in order to avoid '*la perilouse aventure de batayles*.' Trespass in the popular courts of the hundred and county was doubtless of far greater antiquity than the same action in the *Curia Regis*. Several cases of the reign of Henry I. are collected in Bigelow, *Placita Anglo-Normannica*, 89, 89, 98, 102, 127." Ames, *Disseisin of Chattels*, 3 Harv. L. Rev. at 29.

<sup>3</sup> Y. B. 21 Edw. IV. 74-76.

cern of the victim of the tort. Accordingly, one need not be surprised at the following charge given by Brian, C. J., and his companions to a jury in 1486. 'If one takes my horse *vi et armis* and gives it to S., or S. takes it with force and arms from him who took it from me, in this case S. is not a trespasser to me, nor shall I have trespass against him for the horse, because the possession was out of me by the first taking; then he was not a trespasser to me, and if the truth be so, find the defendant not guilty.' Brook adds this gloss: 'For the first offender has gained the property by the tort.'<sup>1</sup>

#### THE EFFECT UPON TITLE OF TRESPASS TO GOODS.

##### (b) *The Modern Rule.*

"To-day, as every one knows, neither a trespasser, nor one taking or buying from him, nor the vendor of a bailee, either with or without delivery by the latter, acquires the absolute property in the chattel taken or bailed. The disseisee of goods, as well as the disseisee of land, has a right *in rem*. The process by which the right *in personam* has been transformed into a real right may be traced in the expansion of the writs of replevin and detinue." Ames, Disseisin of Chattels, 3 Harv. L. Rev. 30.

#### TRESPASS AND THE APPEAL OF ROBBERY COMPARED.

It will not be uninteresting, as we approach the parting of the ways between trespass the tort and trespass the crime, to look for a moment at the crime.

B. has taken A.'s chattel with force and arms. He has committed a wrong against A. and another *contra pacem regis*. In developed law, A.'s wrong is remedied by a civil action, *de bonis asportatis*; the king's wrong, by indictment for robbery or larceny, as the case may be.

But we cannot understand the history of trespass if we deal simply with developed law. The civil action of trespass to chattels gave, to the successful plaintiff, not the specific chattel, but money damages; the appeal of robbery, if certain conditions were fulfilled, would give him the very chattel wrongfully wrested from his hand. What some of those conditions were, let us here inquire.

<sup>1</sup> Ames, Disseisin of Chattels, 3 Harv. L. Rev. 28, 29.

## RECOVERY OF CHATTELS BY APPEAL OF ROBBERY.

(a) *Fresh Pursuit.*

## ROPER'S CASE.

IN QUEEN'S BENCH. 1587.

REPORTED 2 LEONARD, 108.

Roper was robbed by Smith, and within a week after the robbery he preferred an indictment against him, and within a month after the robbery he sued an appeal against Smith, and prosecuted the same until he was outlawed; and thereupon Coke moved to have restitution of the goods taken: and B. of the Crown-office said, that the fresh-suit was not inquired; for upon an appeal one shall not have restitution without fresh-suit. Coke, The books are, that if the defendant in an appeal of robbery be attainted by verdict, the fresh-suit shall not be inquired of: but here he was attainted by outlawry, and not by verdict, and so the fresh-suit cannot be inquired: and here the indictment within a week, and the appeal within a month after the robbery, is a fresh-suit. Wray, Fresh-suit in our law is to pursue the felon from town to town, but the suing of an appeal is not in any fresh-suit: See 21 Edw. IV. 16. Restitution granted upon an outlawry in an appeal of robbery without fresh-suit inquired: 1 Hen. IV. 5, if he confess the felony: see 2 Rich. III. 13.

(b) *Capture by the Appellor or One of His Band of Pursuers.*

REPORTED Y. B. 30 AND 31 EDWARD I. 527. ANNO 1302.

A man pursued a thief who had several stolen things upon him and fled with the oxen; the owner of the oxen followed up the thief with his goods until they came near to a monastery, and the thief took refuge in the church, and remained there until the Coroner came, and summoned him to come to the peace; he did not come, and would not come, but abjured the King's realm; afterwards the Coroner delivered the chattels to the owners, because they had followed up and tried to take the thief who had stolen their goods until he got to the monastery, and because he abjured the realm. The Coroner delivered their chattels, and for having foolishly delivered them, he was brought to judgment before the Justices in Eyre.

(c) *Thief to be Taken with Stolen Goods in His Possession.*

## DICKSON'S CASE.

· IN THE COMMON PLEAS. 1627.

REPORTED HETLEY, 64.

At Sergeant's Inn in Chancery Lane this question was debated, If a man steal goods, and the very owner makes fresh "sute" to take the felon, so that he waives the goods and flies; and before the owner comes, the goods are seised as goods waived, and afterwards] the owner comes and challenges them. Now if he shall have them, or they shall be forfeited was the question. And it was held by Harvey and Crook, that they are not at all forfeited; for that the owner had done his endeavor and pursued from village. And that the goods shall not be said to be waived, but where it cannot be known to whom the property is. Hutton, Chief Justice, and Yellerton said, That goods waived shall be said those which are stolen, and that the felon being pursued, for danger of apprehension waives and flies. Now if they are seised before that the owner comes, the property is presently altered out of the owner in the lord, although that he made fresh "sute," if that "sute" was not within the view of the felon always. But they all agreed, if the felon does not flie, but is apprehended with the goods, that then the owner shall have his goods without question. Or, if the owner comes and challenges the goods before seisure, and after the flight of the felon. Harvey said, The statute of 21 Hen. VIII. c. 13, does not remedy anything, as to the restitution of the goods stolen. But upon the evidence of the party, or by others by his procurement in the same manner. As it was in an appeal upon a fresh "sute" at the common law.

(d) *Thief to be Convicted on Pursuer's Appeal.*<sup>1</sup>

Y. B. 30-31 EDWARD I. 527. ANNO 1302.

"It is coroner's law that he, whose goods were taken, shall not have them back unless the felon be attainted at his suit."

<sup>1</sup> The shortcomings and hardships of the appeal of robbery are too apparent for comment. It never was, even in theory, a substitute for replevin or detinue.



GOODMAN *v.* AYLING.

IN THE COMMON PLEAS. 1608.

REPORTED 1 BROWNLOW AND GOLDESBOROUGH, 213,

Trespass and replevin distinguished.

An action of trespass brought, that the defendant the 8th of February, 4 Jacobi, broke the plaintiff's house, and took and carried away one brass chafer of the plaintiff's, price 20s. The defendant pleads that the house is parcel of half a yard land in P, and that it was holden of H., Earl of North, as of his manor of W. by homage, fealty, escuage, incertain suit of court, enclosure of the park pale, and rent one pound of Comyn, and for the rent behind for three years, and the homage and fealty of Th. P., tenant thereof; the defendant, as servant of the Earl, and by his command, justified the entry, and taking, etc. The plaintiff replies, that the house was held of R. Stanley, as of his manor of Lee, without that, that it was held of the Earl in manner and form; and upon this they were at issue, and the jury found it was held of the Earl, as of his manor of P. by homage, fealty, enclosure of the pale, rent of a pound of Comyn, and no otherwise. And if it seemed to the court that it was not held in manner and form; they found for the plaintiff, etc. And adjudged for the defendant, for although the verdict did not agree with the plea in manner and form of the tenure, yet it agreed in substance in the point, for which the taking was, to wit, that the land was holden of the Earl, and that suffices; for there is difference between a replevin and trespass: for in replevin, because the avowant is to have return, it behoves the avowant to make a good title in all things, but otherwise it is in trespass; for there the defendant is bound only to excuse the trespass, and therefore if there be any tenure, it suffices: for if the lord or bailiff in his right distrains for that which is not due, yet he shall not be punished in trespass, as Littleton, 114, for the manner and form: and 9 Hen. VII., which mark by the whole court: and Fleming, Justice, vouched the 33 Hen. VIII.; Dyer, 48 B. where the issue was, whether a villain regardant, etc. or free: And the jury found a villain in gross, yet it was held good for the substance of the villainage, and of the issue were found, Hen. V. *Jac. rotulo*, 834.

HARVIE *v.* BLACKLOLE.

IN THE COMMON PLEAS. 1610.

REPORTED 1 BROWNLOW AND GOLDESBOROUGH, 286.

Trespass did not lie against the third hand.

An action of trespass brought, wherefore by force and arms his mare so strictly to a gilding did fetter, that by fettering, the mare aforesaid did die. If a stranger take a horse that cometh and strayeth into a manor, the lord may have his action of trespass. If my stray doth stray out of my manor, and goeth into another manor the day before the year be ended, I cannot enter into the other manor to fetch out the stray; if I take an horse as a stray, and another taketh him from me, the action lieth not by the owner against the second taker, because the first taker hath divested the property out of the owner. The defendant in this justified the taking of the mare as a stray, and did not allege that he came as an estray; and the plea was held insufficient, and the court held they could not tie them together. And the defendant said, that the hayward took the mare and delivered her to the defendant; this was but not guilty, and judgment for the plaintiff.

REPORTED SEL. PL. COR. (SEL. SOC.) 88. ANNO 1203.

But a bailee might maintain an appeal of robbery.

Ralph Long appeals William of Winwick, for that he wickedly and in premeditated assault robbed him at Langhaw of fifteen marks of silver which he was carrying as part of his lord's rent, and in respect of which he had become answerable to his lord, and robbed him also of a cloak of vert and a tunic and a half-mark of [Ralph's] own; and this he offers to prove against him. And he added that when he had escaped from [William's] hands he went to the township of Chipping and there raised the cry, and then went to the coroners and afterwards to the county [court], where his complaint was put in writing. And William defends all of it, and says that he was not at the place which [Ralph] has named, nor in the country, and offers the king one mark for an inquest [to find] whether this be spite or no.

A day is given the aforesaid, a month after Michaelmas, to hear judgment.

REPORTED Y. B. 30-31 EDWARD I. 508. ANNO 1302.

Stolen goods in a thief's hands when forfeited to the Crown like his own chattels.<sup>1</sup>

One Alice de Boddemen was attached with a bundle of cloth ; Walter de C. was ready to sue ; and he counted by words of felony. Alice put herself on the Inquest, and was condemned ; and Walter prayed to have his chattels delivered to him. — The Justice asked the Twelve if Alice was first attached at the suit of Walter or at the suit of any one else. — The Twelve, Sir, at the suit of Walter. — Note, that if she had been first attached at the suit of any one else than Walter, Walter would not have had back his chattels.

[Note, that he who wishes to abjure the realm shall take the port assigned to him by the Coroner, and no other port.]

## CHARACTERISTICS OF TRESPASS TO PLAINTIFF'S GOODS.

DAY *v.* AUSTIN.

IN THE KING'S BENCH. 1713.

REPORTED OWEN, 70.

In a trespass, the defendant justified the taking of a furnace fixed to the earth, because the sheriff upon an intent sold **it to him**. And by the court it was held a good discharge : for if a stranger takes my horse, and sells him, a trespass will not lie against the vendee, but a detinue. ~~But if one sells my horse, and a stranger takes him, he is a trespasser.~~<sup>2</sup>

MARLOW *v.* WEEKS.

IN THE COMMON PLEAS. 1744.

REPORTED BARNES, NOTES, 452.

Trespass for assaulting, beating, and wounding plaintiff's mare.

After a verdict for plaintiff, defendant moved in arrest of judgment, objecting, that an action of assault and battery is not applicable to a dead thing, or a brute beast, but to one of the human

<sup>1</sup> See Ames, Disseisin of Chattels, 3 Harv. L. Rev. 24.

<sup>2</sup> So much of the case as does not relate to Injury to Possession is omitted.

species only. The objection was now overruled, and the order nisi causa discharged. Assault upon a ship (a dead thing) bad; but for an injury to a beast, a writ in trespass *vi et armis* appears in the Register; the beating and wounding are found by the jury. Draper for defendant; Wynne for plaintiff.<sup>1</sup>

"There seems to be no such writ in the Register. Trespass for the asportation or the destruction of a chattel are the only writs for trespass affecting personal property. Other injuries to chattels were doubtless deemed of too trivial a nature to warrant a proceeding in the king's court, and were redressed in the inferior courts. See also Y. B. 12 Hen. IV. fl. 8, pl. 15." Ames, Cases on Torts, 49.

### DANIEL COLE v. JACOB FISHER.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1814.

REPORTED 11 MASSACHUSETTS, 136.

Trespass lies for an injury to plaintiff's chattel, even when not amounting to an asportation or a destruction thereof.

Trespass *vi et armis*, for firing a gun, by which the plaintiff's horse was frightened, and ran away with his chaise, and broke and spoiled it, etc.

The cause came before the court upon an agreed statement of facts to the following effect, viz.: The defendant, after washing out two guns, went to the door of his shop, and, standing there, discharged one of the guns, for the purpose of drying it the said shop door being about one rod distant from the highway. At the time of said discharge, the plaintiff's horse, harnessed in his chaise, was fastened by his bridle to the fence on the opposite side of the highway. The horse, being frightened by the discharge of the gun, broke the bridle, and ran away with the chaise, which was thereby broken and injured. After the horse was unharnessed and put into a pasture in the defendant's neighborhood, he discharged another gun, for the like purpose of drying it.

If, upon these facts, in the opinion of the court, the plaintiff could maintain this action, the defendant was to be defaulted, and the plaintiff's damages to be assessed by a jury, unless agreed by the parties; if the plaintiff could not, in the opinion of the court, maintain his action on the facts agreed, he was to become nonsuit, and the defendant recover his costs.

There was no argument, and the opinion of the court was delivered

<sup>1</sup> Such actions are now common. See *Cole v. Fisher*, 11 Mass. 137.

by Sewall, C. J. Upon this state of facts, our opinion is, that the plaintiff has sustained an injury by the act of the defendant. The plaintiff has a right of action, a just demand for damages; but whether in the form of trespass, or of trespass on the case, is a question of some difficulty in the circumstances of this case.

The well-known distinction of immediate injury and consequential injury is the rule upon which our doubts have arisen: in all other respects, the action is clearly maintained for the plaintiff upon the facts agreed.

It is immaterial, as respects the right of action, or the form, whether the act of the defendant was by his intention and purpose injurious to the plaintiff, or the mischief which ensued was accidental, and beside his intention or contrary to it. The decision in the case of *Underwood v. Hewson*<sup>1</sup> has never been questioned. There the defendant was uncocking his gun, when it went off and accidentally wounded a bystander. The defendant was charged and holden liable in trespass. Other cases, before and since, might be cited, in which the same doctrine, which governed in that decision, has been recognized as the law. There is a very full and accurate collection of the decisions on this subject, both as to the right and the form of action, in *Chitty on Pleading*, to which I refer.<sup>2</sup>

In the case at bar, it does not appear, from the facts stated, how near the place where the horse was fastened was to the door of the shop, the place where the gun was fired. If the horse and chaise were in plain sight, and near enough to be supposed to excite any attention or caution on the part of the defendant, or if it was in evidence that he had noticed their being there, exposed to the consequences of his firing the gun, and the distance was such as that, by common experience, there might be a reasonable apprehension of frightening the horse by the discharge of the gun, I should think the defendant, although no purpose of mischief was proved, and even if it was not a case of very gross negligence, liable in an action of trespass. On the other hand, if the plaintiff's horse and chaise were out of his sight, and had not been noticed by the defendant, and the distance was such that no reasonable apprehension of frightening the horse could arise, supposing the horse and chaise to have been observed by the defendant, the injury is hardly to be considered as sufficiently immediate upon the act of the defendant, to render him liable in this form of action.

Upon the whole, if the parties agree in the amount of damages, a contest about the form of action will be of little avail to the

<sup>1</sup> *Strange*, 596.

<sup>2</sup> *Chitty*, 123, 128; *Sir T. Raym.* 422, 467; *Hob.* 134; *Str.* 596.

defendant; as, if he should defeat the plaintiff in this suit, the expenses of it might be properly urged as a ground of further damages, in an action of the case. If the parties do not agree, we shall leave the case to the jury to settle it as a question of fact, upon the principles I have stated.

The court would take this occasion to observe upon the dangers to which travellers on foot and in carriages are exposed by discharges of guns in or near the highways, — dangers affecting not only the property, but the limbs and lives, of their fellow-citizens, and others entitled to the protection of the laws. The extreme inconsiderateness, and sometimes the purposes of wanton mischief, discoverable in acts of this description, are to be corrected and punished. The party injured, either in his person or property, by the discharge of a gun, even when the act is lawful, as at a military muster and parade, and under the orders of a commanding officer, is entitled to redress in a civil action, to the extent of his damage; and where the act is unnecessary, a matter of idle sport and negligence, and still more when the act is accompanied with purposes of wanton or deliberate mischief, and any hurt or damage ensues, the guilty party is liable, not only in a civil action, but as an offender against the public peace and security; is liable to be indicted, and, upon conviction, to be fined and imprisoned, and, indeed, to worse consequences, where loss of limb or of life is the consequence of this inhuman negligence and sport.<sup>1</sup>

### DANNET v. COLLINGDELL.

IN THE KING'S BENCH. 1684.

REPORTED 2 SHOWER, 395.

Trespass for taking and carrying away *averia ipsius quer.*, namely, *unum equum*, etc., *necnon unum galerum Anglice* one hat.

Mr. Holt, after verdict, moved in arrest of judgment, that as to the hat, there is no property laid in the plaintiff.

And judgment was stayed.

<sup>1</sup> 1 Chitty, Plead. 5th ed. 146; *Moreton v. Hardem*, 4 Barn. & Cresw. 226.

## HOYT v. GELSTON.

SUPREME COURT OF NEW YORK. 1816.

REPORTED 13 JOHNSON, 141, AT 150.

Trespass lies by one in possession without title against one who, as a wrong-doer, takes possession of the plaintiff's chattel.

Spencer, J., delivered the opinion of the court. "The bill of exceptions, taken at the trial, presents two points for the consideration of the court:—

"1. Was there sufficient evidence of property in the plaintiff [to maintain trespass] ?

"2. [The second point is here immaterial].

"With respect to the first point, the bill of exceptions states, that the plaintiff gave in evidence, that, at the time of the seizure of the ship 'American Eagle,' by the defendants, she was in the actual, full, and peaceable possession of the plaintiff; and that, on the acquittal of the vessel in the district court, it was decreed that she should be restored to the plaintiff, the claimant of the vessel in that court; and the plaintiff then gave in evidence the proceedings in the district court, by which the above facts fully appeared. In this stage of the cause, and after the plaintiff had proved the seizure of the ship by the defendants, and her value, a motion was made by the defendant's counsel, that the plaintiff should be nonsuited, on the ground that there was not sufficient evidence to entitle the plaintiff to a verdict, (no right or title having been shown in the plaintiff to the ship) We are of opinion that the motion for a nonsuit was correctly overruled. It is a general and undeniable principle, that possession is a sufficient title to the plaintiff in an action of trespass, vi et armis, against a wrong-doer. 1 East's Rep. 244; 3 Burr. 1563; Willes's Rep. 221; Esp. Dig. 403, Gould's edit. part 2, 289. The finder of an article may maintain trespass against any person [but the real owner;] and a person having an illegal possession may support this action against any other than the true owner. 1 Chitty's Pl. 168; 2 Saund. 47 d. If these principles are applied to this case, it will appear, at once, that the evidence of the plaintiff's right to the ship was very ample. He was not only in the actual, full, and peaceable possession of the ship, but he was the claimant of her in the district court; and she has been awarded to him by a sentence of that court. The defendants make the objection without a pretence of right, on their part, as they stand before the court in the character of *tort-feasors*.

"In the progress of the cause, the plaintiff proved himself to be the owner of the ship; and even if it was admitted that the proof before given was insufficient, a new trial ought not to be awarded on the ground of proof of title in the plaintiff, when that very proof was before the jury, and is now spread on the record. In no point of view have the defendants entitled themselves to a new trial on this part of the bill of exceptions."<sup>1</sup>

### SMITH AND ANOTHER v. MILLES.

IN THE KING'S BENCH, 1786.

REPORTED 1 TERM REPORTS, 475.

This was an action of trespass brought by the assignees of a bankrupt against the defendant, who was sheriff of the county of Hertford.

The first count in the declaration was for breaking and entering the messuages, etc., of the plaintiffs as assignees, on the 23d of February, 1786, and seizing and taking the deeds and writings, household furniture, etc. (enumerating them particularly), of the assignees. The second count was for seizing and taking the goods, etc., of the plaintiffs on the 13th of March, 1786.

The defendant pleaded, 1st, the general issue; and 2dly, a justification under a *fiery facias*, sued out on the 13th of February, 1786, at the suit of one Caleb Atkinson, against the bankrupt, and delivered to him on the 21st of February, 1786, to be executed. Replication *de injuria sua propria absque tali causa*.

This cause came on to be tried at the last assizes for the county of Hertford, before Lord Loughborough, when the plaintiffs proved a commission of bankrupt, dated the 27th of February, 1786, against Clarke, on the petition of more than three creditors; and that the bankrupt, at the time of issuing the commission, was indebted to one of them in the sum of £161. They then proved the trading; and an act of bankruptcy on the 1st of February, 1786. They also proved, that on the 23d of February, 1786, and not before, the defendant, as sheriff of Hertford, entered the dwelling-house of the bankrupt, and there seized the several goods, etc., of the bankrupt, under and by virtue of the said writ of *fiery facias*; that on the 28th of the same month of February, Clarke was declared a bankrupt, on which day the commissioners executed a provisional assignment of the bankrupt's estate and effects to their messenger, whereof the officer in possession under the execution on the same day had

<sup>1</sup> The reporter's statement of facts, the arguments, and part of the opinion are omitted.



notice; that on the 13th, 14th, 15th, and 16th days of March, the said goods and chattels were sold by public auction under the aforesaid execution; that on the morning of the said 13th day of March, the said sheriff had notice from the aforesaid provisional assignee not to sell; that on the 17th of March, the plaintiffs were chosen as assignees, etc., of the bankrupt under the said commission, and that an assignment thereof was then duly made to them.

To this evidence the defendant demurred.

Russell, in support of the demurrer. *Shepherd, contra.*

Ashhurst, J. We will consider this question; but it seems to me that it is very like the case of *Cooper and Chitty*.

Buller, J. The second count does not in all cases avoid the necessity of a new assignment. The general use of adding the second count is this; the first charges an injury done to the land, and taking the goods there: that is in its nature local, and must be proved where laid. Then the reason, and almost the only one, for adding the second count is, in order to avoid the locality; it is for taking goods generally. That is of a transitory kind, and may be supported, though the taking be proved to be elsewhere. There cannot be a new assignment but where there is a special plea. And if the case be such that, on a special plea, the plaintiff may be driven to a new assignment, he may give the matter in evidence under the second count on not guilty. *Cur. adv. vult.*

Ashhurst, J., now delivered the opinion of the court.

It might perhaps have sufficed for us to say, that the point now in question has been solemnly determined in this court in the case of *Cooper against Chitty*, upon full and mature deliberation, by a full court. And for that reason, whatsoever our opinions might have been (as we are now only two judges sitting in court), it would not have been very decent in us to have overruled the authority of that case. But we are relieved from any difficulty on that account, as our opinion entirely coincides with that of the judges in the above case.

To entitle a man to bring trespass, he must, at the time when the act was done, which constitutes the trespass, either have the actual possession (Ward v. Macauley, post, Vol. IV., p. 489) in him of the thing which is the object of the trespass, or else he must have a constructive possession in respect of the right being actually vested in him.

Such is the case cited at the bar of an action of trespass for an estray, or wreck, taken by a stranger before seizure by the lord. For the right is in the lord, and a constructive possession, in respect of the thing being within the manor of which he is lord.

So the executor has the right immediately on the death of the testator, and the right draws after it a constructive possession. The probate is a mere ceremony, but, when passed, the executor does not derive his title under the probate, but under the will: the probate is only evidence of his right, and is necessary to enable him to sue; but he may release, etc., before probate.

But there is no instance, that I know of, where a man who has a new right given him, which from reasons of policy is so far made to relate back as to avoid all mesne encumbrances, shall be taken to have such a possession as to bring trespass for an act done before such right was given to him.

But at all events the rule will hold with respect to officers and ministers of justice. *Vide* 2 Ro. Ab. 561, Title Trespass, VI.

In the case of *Lechmere v. Thoroughgood*, 1 Show. 12, which was an action of trespass brought by the assignees of bankrupts against a sheriff's officer, who took goods under an extent, the act of bankruptcy was on the 28th of April; afterwards the sheriff's officer took the goods under an extent, and then an assignment was made to the plaintiffs, who brought trespass: and it was held the action lay not; and the argument turned on this, that the officers shall not be made trespassers by relation. The same doctrine is recognized in the case of *Baily and Bunning*, 1 Lev. 173.

Now here the execution was fully completed, and the goods sold, before the assignment to the plaintiffs. In the case of *Cooper and Chitty*, Lord Mansfield lays down the true ground of distinction between the action of trover and the action of trespass, as applied to this case; "The action of trover (he says) is maintainable, because the conversion, and not the taking, is the gist of the action; and the sale was after the act of bankruptcy was notorious. But (he says) that though the property by relation was in the assignees from the time of the act of bankruptcy, yet the taking by the sheriff, as applied to this species of action, was lawful. And he says the seeming contrariety and confusion in the cases arise from the equivocal use of the word lawful. For (says he) to support the act, it is not lawful; but to excuse the mistake of the sheriff, it is lawful; or in other words the relation introduced by the statutes binds the property; but men who act innocently at the time are not made criminal by relation, and therefore are excusable from being punishable by indictment or action as trespassers. But as a ground to support a wrongful conversion by a sale after a commission publicly taken out and an actual assignment made, it was not lawful." The plaintiffs therefore are not injured, as it is competent to them to recover the value of the goods by bringing a proper action, namely, an ac-

tion of **trover**. But the officer shall not be harassed by this species of action, in which the jury might give vindictive damages.

Therefore on the whole the judgment must be for the defendant.

*Postea* to be delivered to the defendant.

### WHAT MUST BE PROVED.

~~"Trespass to goods is an unlawful taking or interfering with the possession of goods. All other wrongful acts connected with the trespass are aggravation of the wrong. Accordingly, to prove . . . the interrupting of the plaintiff's possession, or right to take possession, of goods is necessary to make, and will make, a *prima facie* case."~~ Bigelow, Torts, 206, 2d Camb. ed.

### (c) *The Genesis of Trespass to Plaintiff's Land.*

Hugh of Ruperes appeals John of Ashby, for that he in the king's peace and wickedly came into his meadows and depastured them with his cattle, and this he offers, etc. And John comes and defends all of it. And whereas it was testified by the sheriff and the coroners, that in the first instance [Hugh] had appealed John of depasturing his meadows and of beating his men, and now wishes to pursue his appeal, not as regards his men, but only as regards his meadows, and whereas an appeal for depasturing meadows does not appertain to the crown of our lord the king, it is considered that the appeal is null, and so let Hugh be in mercy and John be quit. Hugh is in custody, for he cannot find pledges.<sup>1</sup>

### 1. *The Ancient Action, Coupled with Intentional Wrong.*

HUBERT OF ST. Q. v. STEPHEN OF F. *et al.*

ANNO 1195.

REPORTED ROT. CUR. REGIS, 38.

~~[The defendants are appealed of entering the plaintiff's premises feloniously, with force and arms and carrying off turf; and this the plaintiff offers to prove by W. N. and R. of St. M. The de-~~

<sup>1</sup> Sel. Pl. Cor. (Sel. Soc.) 35. Anno 1202 A. D.

"Whatever may happen at a later day, the writ of trespass is as yet no proper writ for a man who has been disseised of land. A whole scheme of actions, towering upwards from the novel disseisin to the writ of right, is provided for one who is being kept out of land that he ought to possess." 2 P. and M. 165.

defendant W. comes and defends the felony, and says that the premises from which he took the turf were his own frank tenement, and not that of the plaintiff. The defendant R. comes and defends everything charged upon him *de verbo in verbum*. Judgment that the sheriff cause a view of the land in question by four knights, and by them report to whom the premises belong.]

"Hubertus de Sancto Quintino appellat Stephanum de Fauconberge et Willelmum de Killinge et Everardum de Whittico et Robertum de Tudintona et illorum vim quod venerunt in terram suam de Bortona cum vi et armis et robberia et nequiter et in pace domini regis asportaverunt catalla sua scilicet turbas ad valenciam LX. solidorum et ea duxerunt in curiam illius Willelmi, et hoc offert probare per Waltherum Norensem qui custos erat terrae illius versus ipsum Willelmum et per Ricardum de Sancto Michaelo versus Robertum qui eum vidit in vi illa, et vicecomes testatur quod Stephanus non fuit inventus quando summonitio primo venit, quia est ultra mare. Willelmus venit et defendit feloniam et robberiam et totum de verbo in verbum et dicit quod turbas quas asportavit, asportavit de libero tenemento suo et de feodo suo, et non in feodo ipsius Huberti; et Hubertus dicit quod turbas illas fodere et facere fecit postquam dominus rex Ricardus applicuit de Alamannia bene et in pace et sine aliquo clamio quod Willelmus inde fecisset, et quod post transfretacionem domini regis in Normanniam illas asportavit; et Robertus totum defendit versus ipsum Hubertum de verbo in verbum. Consideratum est quod vicecomes faciat fieri visum de terra illa unde turbe asportate fuerunt, et per IIII. milites ferre recordum illius visus cujus sit terra illa; apud Westmonasterium." <sup>1</sup>

## 2. *The Modern Action.*

"There is this important distinction between the law relating to possession of real property and that relating to possession of personalty: to enable a plaintiff to recover for trespass to realty, he must have had a real possession [unless, indeed, he had possession 'by relation']; while a plaintiff may recover for trespass to personalty if he had a right to take possession, — in which case he is said to have constructive possession. To assimilate the two cases, it is often said that the right to take possession of personalty draws possession in law. Whoever then has a right to the possession of a chattel, whether it be towards all the world or only towards the defendant, is in a position to sue for an interruption of his enjoyment thereof. For example: The defendant, without permission, takes goods out of the possession of A., after A. has sold them to the plaintiff, but before they have been delivered to him. This is a breach of duty to the plaintiff." <sup>2</sup>

<sup>1</sup> Bigelow, *Placita Anglo Normannica*, 285. The learned writer adds, "It is worthy of notice that the right of property is here ordered to be tried in an action of trespass."

<sup>2</sup> Bacon's *Abr. Trespass*, C. 2; Bigelow's *L. C. Torts*, 370. "*Quære*, whether possession of personalty in itself will support an action, as, e. g. the possession of a thief who is dispossessed by another thief? It is urged that mere possession is enough. Pollock & Wright, *Possession*, 91, 93, 147, 148. It may on the other hand be urged

## GRAHAM v. PEAT.

IN THE KING'S BENCH. 1801.

REPORTED 1 EAST, 288.

The possession of one not holding under legal right is good against a stranger.

Trespass *quare clausum fregit*. Plea, the general issue (and certain special pleas not material to the question). At the trial before Graham, B., at the last assizes at Carlisle, the trespass was proved in fact; but it also appeared that the *locus in quo* was part of the glebe of the rector of the parish of Workington in Cumberland, which had been demised by the rector to the plaintiff, and that the rector had not been resident within the parish for five years last past, and no sufficient excuse was shown for his action. Whereupon it was objected that the action could not be maintained, the lease being absolutely void by the act of the 13 Eliz. c. 20, which enacts that no lease "of any benefice or ecclesiastical promotion with cure or any part thereof shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year; but that every such lease immediately upon such absence shall cease and be void." And thereupon the plaintiff was nonsuited.

A rule was obtained in Michaelmas Term last to show cause why the nonsuit should not be set aside, upon the ground that the action was maintainable against a wrong-doer upon the plaintiff's possession alone, without showing any title.

Cockell, Serjt., Park, and Wood, now showed cause, and insisted that possession was no further sufficient to ground the action even against strangers than as it was *prima facie* evidence of title, and sufficient to warrant a verdict for the plaintiff, if nothing appeared to the contrary. But here it did expressly appear by the plaintiff's own case that his possession was wrongful, for it was a possession in fact against the positive provision of an act of parliament, without any color of title even against strangers. 1 Leon. 307. He was not even so much as tenant at sufferance; though it is not certain

that only that sort of possession which is capable of ripening into a title should be protected, as, e. g. the possession of a finder. In the Roman law a thief could not have the *actio furti*. Dig. 47, 2, 11; id. 47, 2, 12, 1; Inst. 4, 1, 13. See also Buckley v. Gross, 3 Best & S. 566, 573, Crompton, J. As to the criminal law of such cases, see Commonwealth v. Rourke, 10 Cushing (Mass.), 397, 399; Pollock & Wright, Possession, 118 *et seq.*" Bigelow, Torts, 208, 209, 2d ed. English.

that this latter can maintain trespass.<sup>1</sup> It is settled that the plaintiff could not have maintained an ejectment against a stranger who had evicted him.<sup>2</sup> It appears from Plowd. 546, that there must not only be a possession in fact of land to maintain trespass, but the possession must be lawful at the time. And an instance is given, if the king be seised in fee, and a stranger enter upon him claiming title, and continue in possession a year and a day, yet he cannot maintain trespass against a wrong-doer. And though 5 Com. Dig. 537, says that he may, yet the authority cited for it does not warrant the position, and is directly contrary to an adjudged case in 4 Leon. 184 (Lord Kenyon. That goes upon artificial reasoning that the king cannot be dispossessed by an intruder, and does not apply to other cases). Suppose there had been a plea of soil and freehold of the rector, and that the defendant as his servant and by his command entered, etc.; it being settled that there cannot be a traverse to the command;<sup>3</sup> the plaintiff must either have traversed its being the title of the rector, or have shown a legal possession consistent therewith, as that he had a lease from him; and then it would have been shown in answer that the lease was void by the statute; and either way there must have been judgment against the plaintiff. Now it was equally competent to the defendant to avail himself of this upon the general issue.

Law, Christian, and Holroyd, *contra*, were stopped by the court.

Lord Kenyon, C. J. "There is no doubt but that the plaintiff's possession in this case was sufficient to maintain trespass against a wrong-doer; and if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrong-doer. Suppose a burglary committed in the dwelling-house of such an one, must it not be laid to be his dwelling-house notwithstanding the defect of his title under the statute?"

*Per curiam*,

Rule absolute.<sup>4</sup>

<sup>1</sup> Vide 5 Com. Dig. tit. Trespass, B, 1, where it is said that he may against a stranger, and cites 2 Roll. Abr. 551, l. 42, but this latter book lays down the position with "*contra* 9 Hen. VI. 43, b, admit."

<sup>2</sup> Doe d. Crisp. v. Barber, 2 Term Rep. 749.

<sup>3</sup> Vide 6 Co. 24, a, and Salk. 107, but if both parties claim under the same person the command is traversable, for it would be absurd to traverse a title which both admit. Cro. Car. 586.

<sup>4</sup> "Whoever is in possession may maintain an action of trespass against a wrong-doer to his possession." Harker v. Birbeck, 3 Burr. 1563. So Cary v. Holt, 2 Stra. 1238. "Trespass is a possessory action founded merely on the possession, and it is not at all necessary that the right should come in question." Lambert v. Stroother, Willes' Rep. 221.

GEORGE SPARHAWK AND WIFE *v.* PETER B. BAGG.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. NOVEMBER, 1860.

REPORTED 16 GRAY, 583.

A reversionary interest does not entitle the owner thereof to maintain trespass, he not being possessed.

Action of tort for entering with horses and carts upon a close bounded southerly on land formerly of Edward Tuckerman, westerly on Tremont Street, northerly by land of the Boston and Worcester Railroad Corporation, and easterly by land of Paschal P. Pope. The defendant, in his answer, put in issue the plaintiffs' title, and justified under a right of way in the Boston and Worcester Railroad Corporation.

At the trial in the Superior Court of Suffolk at September term, 1857, before Abbott, J., it appeared that the female plaintiff was one of the heirs of Johnson Jackson, who died in 1825; that before his death Jackson and Tuckerman, owning respectively adjoining tracts of land extending from Tremont Street to Washington Street, made conveyances thereof, each giving by agreement twelve feet to make a passage-way twenty-four feet wide, and reserving a right of way therein; that this strip was afterwards called Orange Place or Orange Street, and was the place alleged to be trespassed upon; that the female plaintiff and William Cornell had the title to lands on this place under various deeds, all describing the lands granted as bounded by Orange Place or Orange Street; and that the acts complained of consisted in the defendant, as the servant of the Boston and Worcester Railroad Corporation, driving carts over it. There was no evidence of any special damage done to the soil, or any injury to the female plaintiff's reversionary interest therein. The other facts necessary to the understanding of the case are stated in the opinion. The verdict was for the defendant, and the plaintiffs alleged exceptions.

G. Sparhawk, for the plaintiffs.

G. S. Hale, for the defendant.

Chapman, J. "The questions presented by this case are whether the several rulings of the judge of the Superior Court, as stated in the bill of exceptions, are correct.

"The first relates to a portion of the *locus*, which is described in the mortgage of the plaintiff, George Sparhawk, to Lydia Noyes, made on the 14th of March, 1857. Before any of the acts complained of were done by the defendant, the mortgagee had entered

to foreclose, and she has ever since remained in possession. Sparhawk held the property in right of his wife, and mortgaged his estate. The alleged trespasses consisted of the use of the *locus* as a way by drawing loads of gravel over it with teams. The ruling that the plaintiff had no title to that portion of the premises, sufficient to maintain this action, was correct. If the acts of the defendant were tortious, the mortgagee was the party entitled to the action, and not these plaintiffs, there being no injury done to the reversionary interest.<sup>1</sup>

## THE KING v. WATSON.

*Extract.*

IN THE KING'S BENCH. 1804.

REPORTED 5 EAST'S TERM REPORTS, 480, AT 487.

Lawrence, J. "This is the case of certain persons, who, having, as I understand the case, the exclusive enjoyment of land for a year for the purpose of turning on their cattle, are to be considered as tenants in common of it. The corporation are the owners of the land; the burgesses, it seems, are by the custom entitled to have it divided amongst certain of them every year, according to a certain stint settled by the leet jury: when it is so meted out to them, they are tenants in common. I think it would be very difficult, after the land was so meted out, to say that the corporation could maintain trespass for any injury done on the land to the rights of these persons; because if that were so, it would show that the corporation were in the occupation of it. For as I said before, trespass can only be maintained by those who are possessed of the land. But, according to what I collect from this case, the resident burgesses are the occupiers."

## BROWN v. GILES.

AT NISI PRIUS. 1823.

REPORTED 1 CARRINGTON AND PAYNE, 118,

This was an action against the defendant, for breaking the plaintiff's close with dogs, etc., and trampling down his grass in a certain close, called Bryant's close, in the parish of A., on divers days. The defendant pleaded the general issue,

<sup>1</sup> The part of the opinion as to the other exceptions is omitted. — ED.



The usual notice not to trespass was proved; and a witness proved, that, after the notice, he saw the defendant walking down the turnpike road, and his dog jumped into the field called Bryant's close.

Park, J., was decidedly of opinion that the dog jumping into the field, without the consent of its master, not only was not a wilful trespass, but was no trespass at all, on which an action could be maintained; he should therefore nonsuit the plaintiff.<sup>1</sup>

## SECTION V.

### COVENANT.

"The writ of covenant lies where a party claims damages for breach of covenant, i. e. of a promise under seal." Stephen, Pleading, 76 [Andr. 1st ed.].

Covenant, at its origin, was peculiar to the realty. By the Statute of Wales, it was extended to "movables as well as immovables." As finally developed, it is a personal action, miserably narrow, because limited to specialties.

The history of covenant may be thus briefly traced: 1. In early English law, the use of seals was confined to kings and great men. 2. Later, the use of seals became comparatively general. Every petty knight had a seal. 3. Still later, in the reign of Edward I., it was held that certain unsealed acquittances or receipts were worth nothing because they lacked seals. This, of course, was long before the modern notion of want of consideration made its advent into English law. A rule of procedure declared that an unsealed writing was not admissible as evidence, and the case undoubtedly turned upon that ground. 4. Centuries after, Sir John Davies, Attorney-General of Ireland, reiterated this rule of procedure as the general doctrine of the common law, but noted certain exceptional cases, such as promissory notes and policies of assurance, which were admissible in evidence though unsealed. This, it would seem, because of the custom of merchants to treat such paper as

<sup>1</sup> So much of the case as does not relate to the above issue is omitted. — Ed.

not requiring a seal. 5. We next come to a time when the old rule of procedure broke down altogether, and the exceptional doctrine peculiar to promissory notes and policies of assurance became general. No writing was incompetent as evidence of a contract because it lacked a seal. 6. If an unsealed writing formerly worthless because inadmissible, had been raised to the dignity of admissible evidence, sealed and unsealed instruments would seem to have been put upon a common plane. The law of Contracts in Lord Mansfield's day knew familiarly the modern maxim that, ordinarily, a contract must be based upon a consideration. It knew also that a sealed writing required no consideration; but whether an unsealed writing required a consideration, was not wholly clear. This very question, in the case of *Pillans v. Van Mierop*, Lord Mansfield was called upon to decide. He gave the logical decision—that an unsealed writing was good without consideration. From two standpoints, his decision was right. (a) Because the old dispensation of the law of evidence, which sanctified the specialty and cursed the parol, was dead letter. (b) Because, even in Lord Mansfield's time, education was so rare that to write was a formidable task; and one who laboriously traced upon a parchment the characters that formed his name would not be acting lightly. It could not, therefore, be truly said, that sealed instruments alone required no consideration because he who had set his seal to paper must be presumed to have acted with great deliberation. For the average man of Lord Mansfield's day, signing was as serious as sealing. 7. The last stage in the evolution of covenant was reached when *Pillans v. Van Mierop* was overturned by the House of Lords in *Rann v. Hughes*, and it became English law that every contract must have a consideration or a seal.

Mr. Justice Holmes has said, "Whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source."<sup>1</sup> To what extent may be thus traced the rule

<sup>1</sup> Holmes, *Common Law*, 253.

of substantive law concerning covenant and consideration, is to be gathered from the following pages.

## THE HISTORY OF COVENANT.

### BREVE DE CONVENCIONE.

Rex Vicecomiti salutem. Precipe A. quod juste et sine dilatione teneat B. convencionem inter eos factam de uno mesuagio [cum, *Tot.*] decem acris terre, et quinque acris bosci cum pertin. in N. Et nisi fecerit, etc. tunc summoneas predictum A. quod sit, etc. ostensurus etc., Dat. etc.<sup>1</sup>

## SCOPE OF THE ACTION OF COVENANT BEFORE STATUTE OF WALES, 1284.

### CASE DECIDED MICHAELMAS, ANNO 1201.<sup>2</sup>

"Robert de Anmer offered himself on the fourth day against William de Anmer, of a plea of agreement made between him and the said William about one hundred and seventy-eight acres of land with appurtenances in Anmer. And [William] did not come or essoyn himself. Therefore let him be attached to be [here] on the quindene of S. Martin, to answer, and to show, etc."

"We must not forget that the writ of covenant is no less 'droit-ural' in form than that of debt. . . . Almost all the recorded cases on covenants of the thirteenth and early fourteenth centuries appear to relate to interests in land, although it is certainly said in the Statutum Walliae, c. 10, '*petuntur aliquando mobilia aliquando immobilia*.'<sup>3</sup> Judgment might be given for the recovery of *seisin* where power of re-entry for breach of covenant was expressly given in a lease, and possibly in other cases."<sup>4</sup>

<sup>1</sup> As given in Stat. of Wales, 12 Edw. I. 153. Pickering's Ed.

<sup>2</sup> Sel. Civ. Pl. (Sel. Soc.) Pl. 89.

<sup>3</sup> "De tertio articulo in quo provisum est Breve de conventionione, per quod petuntur aliquando mobilia, aliquando immobilia, per vim conventionis inite inter partes, que legi derogat, in forma in loco prenotato conscripta." Stat. Wales, 12 Edw. I. 159, n. 4.

[The Statute of Wales, *supra*, thus defines the scope of the action of covenant: "Et quia infinite sunt contractus conventionum, difficile esset facere mentionem de quolibet in speciali, set secundam naturam cujuslibet conventionis per affirmationem unius partis et negationem alterius, aut pervenietur ad Inquisitionem faciendam super facto negotii, aut pervenietur ad cognitionem Scriptorum in judicio prolatorum, et secundum illam cognitionem erit judicandum; aut negabuntur Scripta et tunc pervenietur ad inquirendum de confectione Scriptorum per testes in Scriptis nominatos, si fuerint simul cum patria; quod si testes non fuerint nominati, vel etiam mortui, tunc solummodo per patriam."]

<sup>4</sup> Sir Frederick Pollock in 6 Harv. L. Rev. 399.

SCOPE OF THE ACTION OF COVENANT AFTER THE  
STATUTE OF WALES.*Extract.*

REPORTED Y. B. 30 AND 31 EDWARD I. 144. ANNO 1302.

Brumpton. "Inasmuch as this [action of covenant] is a personal action, which is given against the person who committed the trespass and the tort, and you have not assigned any tort in the person of Roger, therefore the court adjudges that you take nothing by your writ, etc., but be in mercy for your false plaint, etc."

*Extract from the Case of*ABBOT WALTER *v.* GILBERT DE BAILLOL. ABOUT 1154.

CHRON. MON. DE BELLO, 106 (AUG. CHRIS. SOC.).

REPORTED BIG. PLAC. ANG. NORM. 175.

[The king grants his writ at the instance of Walter, abbot of St. Martin; to John, Earl of Eu, commanding him to do justice by the abbot against Gilbert de Baillol as to certain lands. The defendant evades the trial in various ways. Leave is finally obtained to bring the suit into the king's court, but the king's presence cannot be obtained. The cause, though much litigated before the justitiars, comes to no satisfactory conclusion. The king's presence is at last obtained, and the trial proceeds. The abbot's case is stated by a monk and by a knight. The charters are read before the court, whereupon Gilbert objects that some of them are without seals. Richard de Lucy replies with contempt at the modern custom for every little knight (*militulus*) to have a seal, and the objection is overruled.]

"Quem intuens vir magnificus et prudens Ricardus de Luce ipsius abbatis frater, tunc domini regis justicia prima, quærit utrum ipse sigillum habeat. Quo asserente se sigillum habere, subridens vir illustris, 'Moris,' inquit, 'antiquitus non erat quemlibet militulum sigillum habere, quod regibus et præcipius tantum competit personis, nec antiquorum temporibus homines ut nunc causidicos vel incredulos malitia reddebat.'"

REPORTED Y. B. 30 AND 31 EDWARD I. 158. CORNISH ITER. A. D. 1302.

Adam le Marchand brought his writ of debt against William Collon, chaplain, and counted that tortiously he withheld from him ten pounds, etc.; and tortiously for this, that whereas he had

bound himself to the said Adam in the said ten pound for the altarage of the church of C., etc. — Lanfar. He owes his debt for the altarage of the church of C., whereof we do not understand that this court can take cognizance, etc. — Berrewik. Answer over. — Lanfar. What have you to show for the debt? — Kyngesham produced a writing which testified the debt. — Lanfar. His writing shows that he leased the altarage to us for one year; thereupon we tell you that the parson died within the year, on which the bishop sequestrated the goods; and we lost the altarage for two weeks, in respect of which we pray to be discharged; and as to the remainder, he can claim nothing, for we have fully paid his proctor. — And he produced two writings indented, made between the proctor and himself, but without seal. — Kyngesham. He has admitted the deed and the debt, and has shown no discharge; judgment, etc. — Berrewik. If he was ejected within the year, as he says, it is not just that he should pay you the pension for the altarage for the whole year; as to the remainder, the acquittances are worth nothing; but if he has really paid, act in good faith, and come to terms. — Hunt said, that for the time for which Adam was ejected William could recover nothing, since, when the cause ceased the effect ought also to cease. And Mutford said, Suits ought not to arise out of suits.

“In a suit at the common law no man’s writing can be pleaded against him as his act and deed, unless the same be sealed and delivered; but in a suit between merchants, bills of lading and bills of exchange, being but tickets without seals, letters of advice and credences, policies of assurance, assignments of debt, all which are of no force at the common law, are of good credit and force by the law merchant.”<sup>1</sup>

[Note that a policy of assurance is a written but unsealed contract to pay a sum of money upon the happening of a specified contingent event, the consideration for such payment being the receipt from the assured of a much smaller sum. — ED.]

“Neither debt nor *indebitatus assumpsit* at that time<sup>2</sup> met the case: a promise to pay £100 could not be supported by payment of £1. Nor would deceit lie, in the form of special assumpsit, i. e. acting on promise held out — the ordinary kind of consideration. See Harriman, Contracts, ss. 631–641, 2d ed. Query whether the case rests properly on the ground of consideration. Promise for promise, etc.”<sup>3</sup>

<sup>1</sup> Sir John Davies, Attorney-General of Ireland, in a pamphlet concerning Impositions, written between 1614 and 1618. Works of Sir John, including his essay in Boston Athenæum (series “Fuller’s Worthies”), ii. London, 1876.

<sup>2</sup> 1614–1618.

<sup>3</sup> Extract from manuscript lecture on Insurance by M. M. Bigelow.

PILLANS *v.* VAN MIEROP.

IN THE KING'S BENCH. 1765.

REPORTED 3 BURROW, 1663.

On Friday 25th of January last, Mr. Attorney-General Norton, on behalf of the plaintiffs, moved for a new trial. He moved it as upon a verdict against evidence: the substance of which evidence was as follows:

One White, a merchant in Ireland, desired to draw upon the plaintiffs, who were merchants at Rotterdam in Holland, for £800, payable to one Clifford; and proposed to give them credit upon a good house in London for their reimbursement, or any other method of reimbursement.

The plaintiffs, in answer, desired a confirmed credit upon a house of their rank in London, as the condition of their accepting the bill. White names the house of the defendants, as this house of rank, and offers credit upon them. Whereupon the plaintiffs honored the draft, and paid the money; and then wrote to the defendants Van Mierop and Hopkins, merchants in London, (to whom White also wrote, about the same time,) desiring to know "Whether they would accept such bills as they, the plaintiffs, should in about a month's time draw upon the said Van Mierop's and Hopkins's house here in London, for £800 upon the credit of White:" and they, having received their assent, accordingly drew upon the defendants. In the interim White failed before their draft came to hand, or was even drawn; and the defendants gave notice of it to the plaintiffs, and forbid their drawing upon them. Which they, nevertheless, did: and therefore the defendants refused to pay their bills.

On the trial, a verdict was found for the defendants.

Upon showing cause, on Monday, 11th February last, it turned upon the several letters that had respectively passed between the plaintiffs, and defendants, and White. The letters were read: 1st. Those from White & Co. in Ireland, to the plaintiffs in Holland; (by which it appeared that Pillans and Rose had then accepted the bills drawn upon them by White, payable to Clifford;) then those of the plaintiffs to the defendants; and also White's to the defendants; then those of the defendants to the plaintiffs, agreeing to honor their bill drawn on account of White; the letter from the defendants to the plaintiffs, informing them "That White had stopped payment," and desiring them not to draw, as they could not accept their draft; and lastly, that which the plaintiffs

wrote to the defendants, "That they should draw on them, holding them not to be at liberty to withdraw from their engagement."

Lord Mansfield. The objection is, "That the letter whereby Van Mierop and Hopkins undertake to honor the plaintiffs' bills, is *nudum pactum*." The other side deny it.

This is the only question here.

Let it be argued again the next term; and you shall have the opinion of the whole court.

*Uterius Concilium.*

[At the trial before the full court] Lord Mansfield asked if any case could be found, where the undertaking holden to be a *nudum pactum* was in writing.

Sergeant Davy. It was anciently doubted "Whether a written acceptance of a bill of exchange was binding, for want of a consideration." It is so said somewhere in Lutwyche.

Lord Mansfield. This is a matter of great consequence to trade and commerce, in every light.

If there was any kind of fraud in this transaction, the collusion and *mala fides* would have vacated the contract. But from these letters, it seems to me clear that there was none. The first proposal from White was, to reimburse the plaintiffs by a remittance, or by credit on the house of Van Mierop; this was the alternative he proposed. The plaintiffs chose the latter. Both the plaintiffs and White wrote to Van Mierop & Co. They answered, that they would honor the plaintiffs' drafts. So that the defendants assent to the proposal made by White, and ratify it. And it does not seem at all, that the plaintiffs then doubted of White's sufficiency, or meant to conceal anything from the defendants.

If there be no fraud, it is a mere question of law. The law of merchants, and the law of the land, is the same. A witness cannot be admitted to prove the law of merchants. We must consider it as a point of law. A *nudum pactum* does not exist in the usage and law of merchants.

I take it, that the ancient notion about the want of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration. And the Statute of Frauds proceeded upon the same principle.

In commercial cases amongst merchants, the want of consideration is not an objection.

This is just the same thing as if White had drawn on Van Mierop and Hopkins, payable to the plaintiffs; it had been nothing to the

plaintiffs, whether Van Mierop & Co. had effects of White's in their hands, or not; if they had accepted his bill. And this amounts to the same thing: "I will give the bill due honor," is, in effect, accepting it. If a man agrees, that he will do the formal part, the law looks upon it (in the case of an acceptance of a bill) as if actually done. This is an engagement "To accept the bill, if there was a necessity to accept it, and to pay it when due;" and they could not afterwards retract. It would be very destructive to trade, and to trust in commercial dealing, if they could. There was nothing of *nudum pactum* mentioned to the jury; nor was it, I dare say, at all in their idea or contemplation.

I think the point of law is with the plaintiffs.

Mr. Justice Wilmot. The question is, "Whether this action can be supported, upon the breach of this agreement."

I can find none of those cases that go upon its being *nudum pactum*, that are in writing; they are all upon parol.

I have traced this matter of the *nudum pactum*, and it is very curious.

He then explained the principle of an agreement being looked upon as a *nudum pactum*; and how the notion of a *nudum pactum* first came into our law. He said, it was echoed from the civil law: — "*Ex nudo pacto non oritur actio.*" Vinnius gives the reason, in lib. 3, tit. De Obligationibus, 4to edit. 596. If by stipulation (and *à fortiori*, if by writing,) it was good without consideration. There was no radical defect in the contract, for want of consideration. But it was made requisite, in order to put people upon attention and reflection, and to prevent obscurity and uncertainty; and in that view, either writing or certain formalities were required. *Idem*, on Justinian, 4to edit. 614.

Therefore it was intended as a guard against rash inconsiderate declarations; but if an undertaking was entered into upon deliberation and reflection, it had activity; and such promises were binding. Both Grotius and Puffendorff hold them obligatory by the law of nations. Grot. lib. 2, c. 11, De Promissis. Puffend. lib. 3, c. 5. They are morally good; and only require ascertainment. Therefore there is no reason to extend the principle, or carry it further.

There would have been no doubt upon the present case, according to the Roman law; because here is both stipulation (in the express Roman form) and writing.

Bracton (who wrote temp. Hen. III.) is the first of our lawyers that mentions this. His writings interweave a great many things out of the Roman law. In his third book, cap. 1, De Actionibus,



he distinguishes between naked and clothed contracts. He says that "*Obligatio est mater actionis*;" and that it may arise *ex contractu, multis modis; sicut ex conventionione, etc.; sicut sunt pacta, conventa, quæ nuda sunt aliquando, aliquando vestita, etc., etc.*

Our own lawyers have adopted exactly the same idea as the Roman law. Plowden, 308 b, in the case of Sheryngton and Pledal v. Strotton and others, mentions it; and no one contradicted it.<sup>1</sup> He lays down the distinction between contracts or agreements in words (which are more base), and contracts or agreements in writing (which are more high); and puts the distinction upon the want of deliberation in the former case, and the full exercise of it in the latter. His words are the marrow of what the Roman lawyers had said, "Words pass from men lightly;" but where the agreement is made by deed, there is more stay; etc., etc. For, first, there is, etc., etc.; and thirdly, he delivers the writing as his deed. "The delivery of the deed is a ceremony in law, signifying fully his good will that the thing in the deed should pass from him who made the deed to the other. And therefore a deed, which must necessarily be made upon great thought and deliberation, shall bind, without regard to the consideration."

The voidness of the consideration is the same, in reality, in both cases; the reason of adopting the rule was the same, in both cases; though there is a difference in the ceremonies required by each law. But no inefficacy arises merely from the naked promise.

Therefore, if it stood only upon the naked promise its being in this case, reduced into writing, is a sufficient guard against surprise; and therefore the rule of *nudum pactum* does not apply in the present case.

I cannot find that a *nudum pactum* evidenced by writing has been ever holden bad; and I should think it good; though, where it is merely verbal, it is bad. Yet I give no opinion upon its being good, always, when in writing. . . .

By the court unanimously

The rule "To set aside the verdict and for a new trial," was made absolute.<sup>2</sup>

<sup>1</sup> "Because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration." Stated in argument by Thomas Bromley and an apprentice of the middle temple, in *Sharyngton v. Strotton*, Plowd. 308 a.

<sup>2</sup> The case is long, and is here but briefly reported. Sufficient is given, however, to show something of its bearing upon the peculiar efficacy of covenants.

RANN *v.* HUGHES.

IN THE HOUSE OF LORDS. 1797.

REPORTED 7 TERM REPORTS, 350.

The Lord Chief Baron Synner delivered the opinion of the judges :

“ But it is said that if this promise is in writing that takes away the necessity of a consideration and obviates the objection of *nudum pactum*, for that cannot be where the promise is put in writing ; and that after verdict, if it were necessary to support the promise that it should be in writing, it will after verdict be presumed that it was in writing ; and this last is certainly true ; but that there cannot be *nudum pactum* in writing, whatever may be the rule of the civil law, there is certainly none such in the law of England. His lordship observed upon the doctrine of *nudum pactum* delivered by Mr. J. Wilmot in the case of Pillans *v.* Van Mierop and Hopkins, 3 Burr. 1663, that he contradicted himself, and was also contradicted by Vinnius in his comment on Justinian.

“ All contracts are by the laws of England distinguished into agreements by specialty, and agreements by parol ; nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved. But it is said that the Statute of Frauds has taken away the necessity of any consideration in this case ; the Statute of Frauds was made for the relief of personal representatives and others, and did not intend to charge them further than by common law they were chargeable. His lordship here read those sections of that statute which relate to the present subject. He observed that the words were merely negative, and that executors and administrators should not be liable out of their own estates, unless the agreement upon which the action was brought or some memorandum thereof was in writing and signed by the party. But this does not prove that the agreement was still not liable to be tried and judged of as all other agreements merely in writing are by the common law, and does not prove the converse of the proposition that when in writing the party must be at all events liable. He here observed upon the case of Pillans *v.* Van Mierop in Burr., and the case of Losh *v.* Williamson, Mich. 16 G. 3, in B. R. ; and so far as these cases went on the doctrine of *nudum pactum*, he seemed to intimate that they were erroneous. He said that all his brothers concurred with him that in this case there was not a sufficient consideration

to support this demand as a personal demand against the defendant, and that its being now supposed to have been in writing makes no difference. The consequence of which is that the question put to us must be answered in the negative."

And the judgment in the Exchequer Chamber was affirmed.<sup>1</sup>

### TURNER *v.* BINION.

IN THE KING'S BENCH. 1661.

REPORTED HARDRES, 200.

In a bill to discover upon what consideration a bond was given, that had been assigned to the king as a debt in aid; the court held that a man was not bound to discover the consideration of a bond, which implies in itself a consideration; and so Baron Atkins said it had been ruled in chancery.

### FALLOWES *v.* TAYLOR.

IN THE KING'S BENCH. 1798.

REPORTED 7 TERM REPORTS, 475.

A bond given to an individual, conditioned to be void if the obligor (on the obligee's agreeing not to prosecute him) should remove certain public nuisances, and not erect any others of the same kind, is good in law.

The defendant, in March, 1796, executed a bond to the plaintiff in the penalty of £500 with a condition, (after reciting that the defendant had erected and for two or three years kept and continued three walls or cribs across the river Wye which were a nuisance to the navigation, that the magistrates assembled at the Quarter Sessions at Hereford had directed the plaintiff to prosecute all persons erecting, keeping or maintaining such walls, cribs, and other nuisances in and upon the river in order to preserve the navigation, and that in pursuance of such orders he (the plaintiff) had prepared bills of indictment against the defendant, who in order to avoid the expense of the indictment had applied to the plaintiff not to prefer the same, upon condition that he (the defendant) should remove the said nuisances and enter into this bond, to which the plaintiff had consented,) that if the defendant did, on or before the first of September then next, entirely remove, take, and carry away, as well the said walls or cribs as all others that he had created or kept and maintained in and upon the said river, and the stones, materials, and foundations of all such walls or cribs, so

<sup>1</sup> The statement of facts is omitted, and part of the opinion is omitted.

that the same should not remain and obstruct the course of navigation of the river, and should not at any time erect or rebuild any other walls or cribs in the river to the prejudice or the navigation, then the obligation should be void.

The plaintiff having declared upon the bond, the defendant cravedoyer of the condition, and pleaded the general issue and performance of the condition, on which issue was joined. And at the last Hereford Assizes before Lord Kenyon, the plaintiff obtained a verdict.

Abbott, in the last term, moved in arrest of judgment, on the ground that the contract disclosed in the condition of the bond was an illegal contract and could not be enforced in a court of justice.

This case was to have been argued to-day, but

The court were all clearly of opinion that they could not arrest the judgment.

Lord Kenyon, C. J., said, the want of a consideration to a bond affords no ground of objection; and if there were anything illegal in this consideration, the defendant should have pleaded it. In the case of Roy v. The Duke of Beaufort, Lord Chancellor Hardwicke did not think that the bond was void at law, but he gave relief to the defendant on the ground that the plaintiff had made an improper use of it.

Lawrence, J. The defendant might have given a bond to the plaintiff without any consideration at all; and why may he not give a bond for a consideration that is legal?

Rule to arrest the judgment discharged.<sup>1</sup>

Leicester, for the plaintiff.

Miles, Lane, and Abbott, for the defendant.

## CHAWNER AND BOWES' CASE.

IN THE COMMON PLEAS. 1613.<sup>2</sup>

REPORTED GODBOLT, 217. CASE 312.

Anciently, covenant did not lie for a sum certain due by virtue of a specialty.

Bowes sold three licenses to sell wine unto Chawner, who covenanted to give him £10 for them; and Bowes covenanted that the other should enjoy the licenses. It was moved in this case,

<sup>1</sup> Abbott's argument is omitted.

<sup>2</sup> Although decided later in point of time than *Anon.*, 3 Leonard, 119, the above case enunciates the ancient rule that "Covenant was not the normal remedy upon a covenant to pay a definite amount of money or chattels;" a rule which seems to have prevailed in the Common Pleas long after it had ceased to obtain in the King's

whether the one might have an action of covenant against the other in such case: And the opinion of Warburton and Nichols, justices, was, That if a man covenant to pay £10 at a day certain, That an action of debt lieth for the money, and not an action of covenant. Barker, sergeant, said, he might have the one or the other. But in the principal case the said justices delivered no opinion.

### ANON.<sup>1</sup>

IN THE QUEEN'S BENCH. 1585.

REPORTED 3 LEONARD, 119.

Debt and covenant both lie to recover a sum certain due by virtue of a specialty.

Debt upon an obligation; The words of the obligation were: I am content to give to W. £10 at Michaelmas; and £10 at our Lady day. It was holden by the court, that it was a good obligation: And it did amount to as much as, I promise to pay, etc. It was also holden by the court, that an action of covenant lay upon it, as well as an action of debt, at the election of the plaintiff. And it was holden, that although the action is for £40 and the declaration is £20 and £20 at the several days; yet it is good enough, and the declaration is well pursuant to it; and afterwards, judgment was given for the plaintiff.

### DEFINITION AND CHARACTERISTICS OF COVENANT.

1 CHITTY ON PLEADING,<sup>2</sup> 129.

"Covenant is a remedy provided by law for the recovery of damages, for the breach of a covenant or contract under seal."

Bench. Precisely when the Common Bench adopted the practice of the King's Bench it is, perhaps, impossible to discover; but the change was probably effected before the end of the reign of Charles I. Ames, *History of Assumpsit*, 2 Harv. L. Rev. 56, 57.

<sup>1</sup> 2 Harv. L. Rev. 56. "The writer [J. B. Ames] has discovered no case in which a plaintiff succeeded in an action of covenant, where the claim was for a sum certain, antecedent to the sixteenth century;" but in the above action of debt to which "the writer" refers, decided in the Queen's Bench, the plaintiff's right to elect between covenant and debt is expressly declared. Pollock and Maitland pay high tribute to the accuracy of Dean Ames's research by assenting freely to his conclusion. 2 Pollock and Maitland, 216.

<sup>2</sup> Martin, 42.

## GALE v. NIXON AND NIXON.

SUPREME COURT OF NEW YORK. 1826.

REPORTED 6 COWEN, 445.

*Covenant Defined.*

A sealed recognition of an unsealed contract will not make that contract a covenant.

On error from the C. P. of Tioga. The action in the court below was *indebitatus assumpsit* by the plaintiff against the defendants. The declaration contained counts for lands bargained and sold; for lands bargained, sold, and possession given; and lands sold and conveyed; with the money counts. Plea, the general issue.

On the trial in the court below, the plaintiff relied on articles of agreement signed and sealed by the plaintiff only; and delivered to and accepted by the defendants, dated April 14, 1821. These articles purported to be by both parties; naming the plaintiff as of one part; and the defendants, W. and G. Nixon, as of the other. The plaintiff, for the consideration of \$300, to him paid, and of \$500 to be paid, as thereafter mentioned, covenanted to convey, within two years, at his own costs and charges, two described parcels of land, of 60 and 80 acres, to the defendants in fee; and the defendants covenanted to pay the plaintiff, on the execution of the conveyance, \$500. It was also agreed, that the defendants might take immediate possession of the premises, and continue so in possession, taking the profits, till the conveyance should be executed. On the articles was an indorsement, dated May 31, 1822, under the hand and seal of J. & W. Nixon, stating that they had, on the part of W. & G. Nixon, the defendants, with the consent of the plaintiff, entered into an agreement with T. Astley for the purchase of one of the described parcels (the 80 acre lot), and given their bond to Astley, for the balance on that lot, \$391.42; and that they did thereby discharge the plaintiff from so much of his agreement as bound him to convey this described parcel. Afterwards, the defendant paid this balance to Astley, who owned the 80 acre lot, and took a deed of him, within two years from the date of the articles. The payment to, and conveyance by Astley, were pursuant to the agreement and understanding to both the parties to this suit; who agreed that the payment of the \$391.42 should apply on the articles between them. A few weeks after the date of the articles, the

defendants took possession of both parcels; and remained in possession up to the time of the trial. The plaintiff had caused a deed with warranty to be tendered to the defendants, for the 60 acre lot, before suit brought in the court below; but more than two years from the date of the articles. This deed was produced ready for them, at the trial.

The defendants moved the court below for a nonsuit, on this [among other grounds] that the articles being sealed, the action should have been covenant.

E. Dana, for the plaintiff in error.

A. Collins, *contra*.

*Curia*,<sup>1</sup> per Sutherland, J. "The plaintiff was nonsuited at the trial, his right to recover being objected to on three grounds: 2. That if it was a valid contract, it being sealed, the action should have been covenant. . . . Assumpsit was the proper form of action. Covenant will lie only when the instrument is actually signed and sealed by the party, or by his authority. A recognition of the contract, though in writing and under seal, will not make it a covenant. If the instrument by which the original contract is admitted, contain, in itself, a specification of the terms, and consideration of the contract, an action perhaps might be sustained upon that; and in such case, if it was under seal, the action must be either debt or covenant.

"The plaintiff was improperly nonsuited, and the judgment must be reversed. Judgment reversed."

## NURSE v. FRAMPTON.<sup>2</sup>

IN THE KING'S BENCH. 1694.<sup>3</sup>

REPORTED 1 SALKELD, 214. S. C. 1 LD. RAYMOND, 28.

The bare signing and sealing of an agreement makes it a covenant.

Debt for £25, and declares that, by deed between him and the defendant, it was agreed, that the gray nag of the defendant, between the day of the date thereof, and the last of August, a day's notice being given to the plaintiff, should ride from Hyde Park Corner to the first house in Reading, in three hours for £50 bet on

<sup>1</sup> So much of the opinion as does not relate to the definition of a covenant is omitted. The arguments of counsel are also omitted.

<sup>2</sup> So much of the case as does not relate to the right to sue upon a covenant is omitted. — ED.

<sup>3</sup> In the report in Lord Raymond, 28, the case is given as of Mich. Term, 6 William and Mary, while in 1 Salkeld, 214, it is given as Pasc. 6 William III.

each side, on the forfeiture of £25, and avers, that the defendant gave not a day's notice, and that the horse did not ride; the defendant craves oyer of the deed, which was, It is agreed that a gray nag, etc. In witness whereof we have hereunto set our hands and seals. *Et nota*; they were not otherwise named in the deed. Hereupon the defendant pleaded that the plaintiff absconded for felony from such a day till after the first of August, so that he could not give notice. To this there was a replication and rejoinder both impertinent, and a demurrer; whereupon it was objected, that bare setting names and seals would not make them parties, so as to have this action. *Vide* 2 Inst. 673; 3 Cro. 59; 2 Ro. 22. But the court held, 1st. That the cases were not alike, and that an action would lie by the bare signing and sealing. . . . Judgment for the plaintiff.

MOORE *v.* JONES.

IN THE KING'S BENCH. 1728.

REPORTED 2 STRANGE, 814.

Apt words of sealing must be used in a declaration in covenant.

Error of a judgment in C. B. in an action of covenant wherein the plaintiff declared, that the defendant *per quoddam scriptum suum factum apud Westm' concessit* to the plaintiff an annuity *pro consilio impendendo*, and assigns the breach in non-payment for a certain time. Upon oyer, which was set out *in hæc verba*, and concluded with, In witness whereof I have hereunto set my hand and seal; the defendant pleaded, that during that time the plaintiff gave no counsel; and on demurrer there was judgment by default for want of a joinder, and in B. R. general errors assigned.

Robinson, *pro quer' in errore*, objected, that the plaintiff had not in his declaration entitled himself to an action of covenant it not being shown that the grant was by deed, without which covenant will not lie. 3 Leon. 192; Cro. Car. 180, 209. Here is no *sigillo suo sigillat'*; and the word *factum* here must be taken to be an adjective, to make sense of the words *apud Westm'*; as *assumpsit* indeed might lie upon such a writing. Cro. Eliz. 117, 571; 3 Lev. 234.

Hussey, *contra*. The oyer must be taken as part of the declaration, and by that it appears there was a sealing. The words *convenit et concessit* imply a deed. 2 Vent. 106, 150; Palm. 173; 4 Leon. 173, 175; 2 Roll. Rep. 228; 1 Lutw. 333; Godb. 125; Cro. Car. 209; Cro. Jac. 420; Cro. EL. 737; 2 Lutw. 1667. In 5 Co.



51 b, it is said, a pension cannot be without a deed, and why then shall it not be implied of an annuity? Pasch. 8 Geo., *Atkinson v. Coatsworth*, *per indenturam convenit* was held good. The word *conventio* is a technical word, and the Register is only *quod teneat conventionem*. The oyer may be taken either as part of the declaration or plea. Cro. Jac. 679; Carthew, 513. And the plea of *non impendit consilium* admits the deed so far that in evidence it need not be proved. Cro. Jac. 682; 124 Cro. Car. 209.

[Raymond] C. J. None of the cases come up to this, where the word *factum*, being joined to *apud Westm'* renders it impossible to be taken as a substantive. *Convenit* in a declaration would never do alone; and though it is alone in the Register, yet that is only a short description of the nature of the cause, to be explained more at large when the plaintiff comes to count upon it. I do not see the plea has made it good.

Page, J. If *scriptum* does not signify a deed (as nobody will pretend it does), here is nothing else to import it; the oyer does not prove it was actually sealed, for everybody knows the words, In witness, etc., are in the instrument before it is so much as signed by the party. And indeed oyer of a sealing was never heard of before.

Reynolds, J. I think this declaration is not to be maintained. Anciently the words *sigillatum et deliberatum* were required. But now it is held well enough to call it *factum, indentura, scriptum indentatum*, which imply the circumstances of sealing and delivery. A *concessit solvere* lies in Bristol, and yet the word *concessit* does not imply a deed. Nor is there anything in the plea which makes the declaration to be better than upon the face of it.

Probyn, J. I do not think *convenit* a better word than *promisit*, for if the circumstances of sealing and delivery were shown, *promisit* would be well enough. The word *scriptum* alone will not make it to be a deed, and there is nothing else left to imply it. *Et per curiam*. The judgment was reversed.

## HOLDER v. TAYLOR.

REPORTED HOBART, 12.

Covenants may, by the use of apt words, be implied as well as express.

Holder brought an action of covenant against Taylor; and declared for a lease for years made by the defendant by the word demisi which imports a covenant; and then shows that, at the time of the lease made, the lessor was not seised of the land but a

stranger, and so the covenant in law broken; but he did not lay any actual entry by force of his lease, nor any ejectment of the stranger, nor any claiming under him: whereupon it was objected that no action of covenant could lie, because there was no expulsion. But the whole court was of opinion that action did lie; for the breach of the covenant was, in that the lessor had taken upon him to demise that which he could not; for the word *demisi* imports a power of letting, as *dedi* a power of giving. And it is not reasonable to enforce the lessee to enter upon the land and so to commit a trespass. But if it were an express covenant for quiet enjoying, perhaps it were otherwise.

M'VOY *v.* WHEELER *et al.*

SUPREME COURT OF ALABAMA. 1837.

REPORTED 6 PORTER, 201.

Covenant does not lie upon a contract made under seal, and later materially changed by parol.

Campbell, for plaintiff in error.

Thornton, *contra*.

Collier, C. J. Several questions were raised in the Circuit Court upon the demurrers to the declaration and pleas, which were so disposed of, as to make it necessary for an issue of fact to be tried by the jury, who found a verdict for the plaintiffs on which judgment was rendered. At the trial, a bill of exceptions was taken by the defendant below, who prosecutes a writ of error to this court, and assigns the judgment on the demurrers and the decision of the court excepted to, as causes for reversal.

We shall only consider the sufficiency of the declaration, which presents the question whether an action of covenant will lie upon an agreement under seal (to perform certain work), which has been modified, or the time of performance enlarged by parol.

Covenant can only be maintained upon a writing under seal. If a contract be unattested by a seal, or is unwritten, the action by which redress can be had, for a nonperformance, is debt or assumpsit, or either, according to the subject-matter. If new terms are introduced into a contract, other duties imposed, or another day provided for its consummation, it is clear that the original contract does not remain unimpaired, so that an action would lie for a breach of its stipulations. If, then, no action could be maintained upon the original contract, when thus modified, we think it follows that the present action is misconceived. For though the modifications are set out in the declaration, yet they are shown to be by parol, and

cannot, according to the premises we have assumed, be made the basis either in whole or in part of an action of covenant.

The case of *Littler v. Holland*<sup>1</sup> was an action of covenant, upon an agreement under seal, to build two houses by a certain day. It appeared on the trial that the time of performance was enlarged by parol, and that the houses were built within the enlarged time. This evidence, it was held, did not support the allegation in the declaration, and the plaintiff was nonsuited.

So, in *Brown v. Miller*,<sup>1</sup> an action of debt was brought on a bond to submit to arbitration. The condition limited the time for the arbitrator to make his award. The declaration alleged that the time was enlarged by mutual consent, and that the award was made within that time. On demurrer, it was determined that the remedy on the bond was gone, by the failure to make the award within the time contemplated by its condition. To the same effect, also, is the case of *Freeman v. Adams*.<sup>2</sup>

In *Phillips et al. v. Rose*<sup>3</sup> the plaintiff agreed to build an oil mill within a prescribed time, which was enlarged by parol, and the work completed within the enlarged time. The court held that evidence of the enlargement would not support the declaration. And in *Jewell et al. v. Schroepel*<sup>4</sup> the court considers the law as settled, "that the plaintiffs, inasmuch as they had not performed, within the time stipulated by the original contract, could not recover upon the covenants contained in it. They could not, in such an action, give evidence of an extension of the time."

In *Langworthy v. Smith*,<sup>5</sup> the Supreme Court of New York reaffirm the previous decisions of that court, on the point, and consider it as beyond doubt that a parol agreement to enlarge the time for the performance of covenants is good; and that by an enlargement the remedy upon the covenant itself is lost and must be sought upon the agreement enlarging the time of the performance.

In the case at bar, the declaration shows that the contract was so materially varied, and the labor of the defendants so greatly increased, that they could not perform it until several months after the expiration of the day therefor appointed. It will, therefore, follow that the action cannot be maintained, and that the plaintiffs must resort to their remedy upon the parol agreement, making the covenant, so far as material, inducement to the action. The judgment is reversed.<sup>6</sup>

<sup>1</sup> 3 T. R. 590.

<sup>3</sup> 8 Johns. Rep. 392.

<sup>5</sup> 2 Wend. 587.

<sup>6</sup> The reporter's statement of facts is omitted.

<sup>2</sup> 9 Johns. Rep. 115.

<sup>4</sup> 4 Cowen, 565.

BENNUS *v.* GUYLDLEY.

IN THE KING'S BENCH. 1618.

REPORTED CRO. JAC. 505.

1. Covenant, not assumpsit, lies for breach of a specialty.
2. The declaration in covenant need set forth only so much of the deed as is necessary for the maintenance of the action.

ACTION UPON THE CASE. Whereas the defendant recovered against him £7 10s. for costs and damages, and upon that judgment the plaintiff paid to him £7, and the defendant made him a release of that judgment, and by his deed covenanted that he would withdraw all process of execution for that debt; that the defendant intending unjustly to vex him, against this release, and against his promise in the said writing, the 20 June, 15 Jac. I., sued a *capias ad satisfaciendum* against the plaintiff for this debt, returnable in Trinity Term following, which he delivered to the sheriff to execute; who by force thereof, afterward, namely, the 20 July, 15 Jac. I., arrested him and detained him in prison until he paid the £7 10s. to his damage, etc.

The defendant demanded oyer of the deed, which was entered in *hæc verba*; wherein was the clause of release and covenant to withdraw the process of execution; and also another covenant which was not mentioned, namely, to acknowledge satisfaction upon the plaintiff's cost, upon request.

The defendant pleaded hereto that the sheriff did not arrest him by his appointment.

This plea being vitious, the plaintiff demurred; and upon argument the defendant did not maintain his plea, but took exceptions to the declaration.

Secondly,<sup>1</sup> that he ought to have had an action upon the case, upon the promise to withdraw process of execution; and if he had extended, yet an assumpsit lies not thereupon, because it is by deed, and so he ought to have an action of covenant, and not an assumpsit. And of that opinion was the whole court as to that point.<sup>2</sup>

Fourthly, it was objected that the declaration was not good, because he declares upon a deed, and recites but parcel, whereas he ought to show the whole deed. *Sed non allocatur*; for he mentions as much as serves for his purpose in this action, and the residue shown doth not alter it. Wherefore, for the first and third exception, it was adjudged for the defendant.

<sup>1</sup> The first exception was that he ought to have relieved himself by *audita querela*.

<sup>2</sup> Thirdly, It was objected that it appears by the plaintiff's own showing that the sheriff arrested him long after the return of the writ.

## GREENE v. HORNE.

IN THE KING'S BENCH. 1694.

REPORTED 1 SALKELD, 197.

The declaration in an action on a covenant must not set forth matter not contained in the deed itself, so as to alter the case.

In covenant the plaintiff declared that A., being indebted to him, and arrested at his suit, the defendant, in consideration that he would order the bailiff to let A. go at large, undertook and covenanted with the plaintiff to bring in the body of the said A., and deliver him into the custody of the said bailiff, such a day, etc. The defendant prayed oyer of the deed, which was, I (the defendant) do promise and engage myself to bring in the body of A. to the custody of B. bailiff, such a day; and thereupon it was demurred. *Et per Cur.* First, The plaintiff cannot set forth matter of fact in his declaration not contained in the deed itself, so as to alter the case; therefore, all such matter of fact so alleged or averred is immaterial. 8 Rep. 151.

Secondly. The plaintiff is no party to the deed, nor so much as named in it, and though covenant may be brought on a deed-poll, yet the party must be named in the deed. 1 Rol. Ab. 517.

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## ANONYMOUS.

*Extract.*

REPORTED Y. B. 48 EDWARD III. 2, PL. 4. ANNO 1355.

"I never heard that any one should have a writ of covenant against executors, nor against other person but the very one who made the covenant, for a man cannot oblige another person to a covenant by his deed except him who was a party to the covenant."

## CHAPTER III

THE STATUTE OF WESTMINSTER II., 1285 A.D., 13 EDWARD I. CH. 24.

THE PARENT OF CASE, TROVER, AND ASSUMPSIT.

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### SECTION I.

#### CASE.

TRESPASS on the case was summoned into being to meet the shortcomings of the actions which preceded it; and which, down to the year 1285, were all that an English suitor had at his command.

We have seen that debt was unsatisfactory because it lay only for a sum certain; that covenant was miserably inefficient, because it was confined to specialties; and that hence there was no action *ex contractu* to recover an unliquidated sum due by virtue of a simple contract. Example, to recover money for work done under an implied contract. X., a tramp strolling by a hayfield, saw the laborers there vainly striving to get the hay under shelter before an approaching storm arrived. X., without words, jumped over the fence, and the hay was then with his help safely housed. What could X. recover for his labor? Nothing.

So in the realm of torts, detinue could be overcome by oath helpers; the exactness of the description required made it a difficult remedy; and trespass was worthless for him who had been damaged by a merely consequential injury. Example, if plaintiff fell over a log negligently left in the highway and was hurt, he could recover nothing.

But if there were no remedies broad enough to guard such rights, why were not new remedies invented? We must resort to the history of case for answer. The history of case is divisible into three distinct periods. 1. Before

the Provisions of Oxford. **2.** After the Provisions of Oxford and before the Statute of Westminster II. **3.** After the Statute of Westminster II. The characteristic feature of each period is some modification of the right to issue new writs and thus to create new actions.

1. Before the Provisions of Oxford, a new form of action might easily be invented.

**2.** In **1258**, there were promulgated the Provisions of Oxford, which commanded the chancellor to issue no more writs, except writs "of course," without command of the king and his council present with him. This finally ended the right to issue special writs, and at last fixed the common writs in unchangeable form. Big. His. of Pro. 197, 198.

Now since the suitor who desired a remedy for his wrong had to have a writ to start proceedings, unless he could find in the king's registry of writs a precedent exactly suited to his case, he was without a remedy. The writ book may be compared with a shop to which customers came with samples to buy wares; unless the suitor could find a formed writ to match his exact set of facts, he had to abandon his search, and go his way unsatisfied. It is now a legal maxim that where there is a right, there is a remedy—it might then have been said, there is no right without a writ. *Ashby v. White*, 2 Lord Raymond, 938; s.c. *post*.

**3.** This led to the Statute of Westminster **II**, which provided that where there was a wrong which, though analogous, was not within the scope of the writs in common use, the chancery clerks might issue a like writ in similar cases, adapted to the circumstances of the particular case.

Thus, before the statute, if A. threw a stick at B. and it hit him, A. was guilty of a trespass. But if A. simply threw a stick into the road, and B. fell over it and was injured, A. was not guilty of a trespass. The statute gave a remedy in the second case as well as in the first. The new action was called, "Trespass on the case;" and lies to recover damages for an indirect and consequential injury to one's person or property or other right.

## HISTORICAL.

POWER TO CREATE NEW WRITS BEFORE THE PROVISIONS OF OXFORD.  
IN THE AGE OF GLANVILL.

"A new form of action might be easily created. A few words said by the chancellor to his clerks — 'Such writs as this are for the future to be issued as of course' — would be as effectual as the most solemn legislation.<sup>1</sup> As yet there would be no jealousy between the justices and the chancellor, nor would they easily be induced to quash his writs." 1 Pollock and Maitland, 149.

## IN THE AGE OF JOHN.

EARLY INSTANCES OF ACTIONS IN THE NATURE OF ACTIONS ON THE  
CASE BEFORE THE PROVISIONS OF OXFORD.NORFOLK. TRINITY, A. D. 1200.<sup>2</sup>

Matilda, who was the wife of Roger le Passur, complains that John de Mewick has deforced her of her land in Fransham [?] which she recovered against him by judgment of the court, so that no one dare till that land because of him, nor could she deal with it in any way because of him. John comes and defends the force and injury and all of it; and because the sheriff testified that he believed what she said to be true, it is considered that John do defend himself with the twelfth free hand, in five weeks after Michaelmas. Pledge of the law, Roger de Bintree.

HERTFORD. MICHAELMAS, A. D. 1201.<sup>3</sup>

Peter de Paxton complains that Osbert Male unjustly took his oxen and sold them at Waltham Fair, which (oxen) were worth five marks, so he says, and besides (Osbert) had troubled him in other ways, on account of which his land was untilled, so that he was damaged through Osbert to the value of twenty marks; and this he offers (to prove), etc., by sufficient suit, which he produced. And Osbert comes and defends the whole of it, word by word, against (Peter), and against his suit, etc. It is considered that (Osbert) do

<sup>1</sup> ["Rot. Claus. Joh. p. 32. A writ of 1205, which in technical terms is 'a writ of entry sur disseisin in the per,' has against it the note 'Hoc breve de cetero erit de cursu.'"]

<sup>2</sup> Sel. Soc. (Sel. Civ. Pl.) pl. 7.

<sup>3</sup> Ibid. pl. 86. Cf. McKelvey, 59.



defend himself twelve-handed, i. e. with eleven compurgators). Pledge for making the law, William Russell. A day is given on the octave of S. Martin.

### AN EARLY ACTION IN THE NATURE OF DECEIT.<sup>1</sup>

NORTHAMPTONSHIRE EYRE, A. D. 1202.

The jurors say that Andrew, Sureman's son, appealed Peter, Leofwin's son, Thomas Squire and William Oildene of robbery. And he does not prosecute. So he and Stephen Despine and Baldwin Long are in mercy, and the appellees go without day.

Afterwards comes Andrew and says that (the appellees) imprisoned him by the order of William Malesoures in the said William's house, so that he sent to the sheriff that the sheriff might deliver him, whereupon the sheriff sent his serjeant and others thither, who on coming there found him imprisoned and delivered him, and he produces witnesses, to wit, Nicholas Portehors and Hugh, Thurkill's son, who testify that they found him imprisoned, and he vouches the sheriff to warrant this. And the sheriff, on being questioned, says that in truth he sent thither four lawful men with the serjeant on a complaint made by Nicholas Portehors on Andrew's behalf. And those who were sent thither by the sheriff testify that they found him at liberty and disporting himself in William's house. Therefore it is considered that the appeal is null, (and Andrew is in mercy) for his false complaint and Nicholas Portehors and Hugh, Thurkill's son, are in mercy for false testimony. Andrew and Hugh are to be in custody until they have found pledges [for their amercement].

### THE FIRST REPORTED CASE UPON A WRIT OF DECEIT.<sup>2</sup>

REPORTED 21 EDWARD I. 44, A. D. 1293. IN THE COMMON BENCH.

John (Lovetot) brought a writ of debt against B., and recovered the debt by judgment of the king's court. John had a judicial writ to the sheriff to cause the debt to be levied out of B.'s chattels. John Lovetot sent to the sheriff his attorney named Robert to get the money; and the sheriff could not find anything but corn growing on the land; so he delivered to him the corn which he found growing on the land; and the sheriff returned that he had executed the king's command. Then came John Lovetot and said

<sup>1</sup> Sel. Soc. (Sel. Pl. Cor.) pl. 45.

<sup>2</sup> Big. L. C. Torts, 18. The last reported case on a writ of deceit is *Pasley v. Freeman*. Here the distinction between "deceit" and "in the nature of deceit" breaks down. *Pasley v. Freeman*, 3 Term Reports, 51 (1789).

the sheriff had returned falsely and in deceit of the court; whereupon he had a writ of deceit out of the Rolls to compel the sheriff to appear. The sheriff came and said that he had made a good return, and that he had executed the king's command; and that he found only corn on the land, and that he delivered to John Lovetot's attorney, whom he had sent, the wheat barley, etc., which he found growing on the land, ready, etc. — John Lovetot. What have you to show it? — The sheriff. It is not for us to have the acquittance. Ready, etc. by a good jury. Hertford. Did you send your attorney or not? — Lovetot admitted freely that he sent him there, but he said that the sheriff did not deliver anything to him; and (said he), See here the attorney who will tell you the same thing. — The attorney came and said that he (John Lovetot) made him his attorney, but that the sheriff did not deliver anything to him; and that he was ready to aver. — Hertford. You cannot be a party to the averment that he made you his attorney to receive the monies; for you are not a party to this writ of deceit. — John Lovetot. Sir, it seems that he ought to be party to the averment that he did not deliver anything to him, because the sheriff says that he did deliver to him, etc. — Hertford. Lovetot, will you prosecute your plaint, or not? — He would not accept the averment, but prayed that the attorney might make the averment. Wherefore it was adjudged that the sheriff should go without day and that John should be in mercy.

#### PROVISIONS OF OXFORD. [ANNO 1258.]

*This the Chancellor of England swore.* — That he will seal no writ, excepting writs of course, without the commandment of the king and of his council who shall be present. Nor shall he seal a gift under the great seal, nor under the great ( ),<sup>1</sup> nor of escheats, without the assent of the great council or of the major part. And that he will seal nothing which may be contrary to the ordinance which is made and shall be made by the twenty-four, or the major part. And that he will take no fee otherwise than what is given to the others. And he shall be given a companion in the form which the council shall provide. Ann. Monast. 448.<sup>2</sup>

*Of the Chancellor.* — The like of the chancellor. That he at the end of the year answer concerning his time. And that he seal nothing out of course by the sole will of the king. But that he do it by the council which shall be around the king. Ann. Monast. 451.<sup>3</sup>

<sup>1</sup> A blank space in the manuscript.

<sup>2</sup> Stubbs's "Select Charters," 393.

<sup>3</sup> Ibid. 394.

("In the year 1258 the provisions of Oxford were promulgated; two separate clauses of which bound the chancellor to issue no more writs, except writs 'of course,' without command of the king and of his council present with him. This, with the growing independence of the judiciary on the one hand, and the settlement of legal process on the other, terminated the right to issue special writs, and at last fixed the common writs in unchangeable form; most of which had by this time become developed into the final form in which for six centuries they were treated as precedents of declarations." Big. Hist. Proced. 197, 198.)

STATUTE WESTMINSTER II. 13 EDWARD I., CAP. 24.  
[ANNO 1285.]

In like cases like writs be grantable.

II. (3) And whensoever from henceforth it shall fortune in the chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy, is found none; the clerks of the chancery shall agree in making the writ; (4) or the plaintiffs may adjourn it until the next Parliament, and let the cases be written in which they cannot agree, and let them refer themselves until the next Parliament; and by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants.<sup>1</sup>

COOKE *v.* GIBBS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1807.

REPORTED 3 MASSACHUSETTS, 193.

The statute Westminster II. operates as part of the common law in Massachusetts, to the extent of making new writs grantable.

Debt on a judgment of the court of Common Pleas, for this county. The writ directs the sheriff to attach the goods or estate of the defendant, and to summon him to appear, etc. The declara-

<sup>1</sup> *Writ of Trespass on the Case*. — If W. etc. then put I. etc. to show wherefore, whereas he the said I. undertook to make and build three carriages for conveying victuals and tackle of him the said W. to parts beyond sea, for a certain sum of money, one part whereof he beforehand received, within a certain term between them agreed; he the same I. did not care to make and build the carriages aforesaid within the term aforesaid, by which he, the said W., hath wholly lost divers his goods and chattels, to the value of one hundred marks, which ought to have been conveyed in the carriages aforesaid, for want thereof to the great damage of him the said W., as it is said: and have, etc. — Fitz. N. B. 94 A.

tion, after reciting the judgment, and alleging that four several executions issued upon it, goes on to state the delivery of the fourth to the sheriff, who committed the defendant to prison, from whence he was afterwards, in due course of law, liberated by force of "an act for the relief of poor prisoners who are committed by execution for debt." 1787, c. 29.

The defendant demurs to the declaration, and assigns the following causes of demurrer, namely :

1. For that the sheriff in and by the writ is commanded to attach the goods or estate of the said Solomon, without excepting his wearing apparel, etc.

2. For that it does not appear, by the declaration aforesaid, that the said Solomon was legally discharged from prison, nor that a writ of execution on said supposed judgment had not issued, after the supposed discharge of the said Solomon, and was not in force at the time of bringing this action.

The plaintiff joins in demurrer.

Bliss, for the defendant, contended that writs must follow the forms prescribed by the law. Our statutes furnish no such form as this, which commands the sheriff to attach the defendant's goods, and to summon him to appear. It is in fact uniting in one writ the two several writs of attachment, and original summons. But if a plaintiff may thus confound the different forms of writs, it is conceived that such a writ cannot, and indeed that no writ whatever can command the attachment of all the goods without exception, of a debtor who has been admitted to the poor prisoner's oath, as it is called, since the statute expressly frees from the operation of the original judgment, and of course of an action of debt, brought upon such judgment, the wearing apparel and household furniture, necessary for the debtor, his wife and children, and tools necessary for his trade or occupation.

Sedgwick, J. There is a special demurrer to the declaration in this case, and the first cause assigned has relation to the writ only. Whether the writ is good or not, no advantage can be taken of its defects under a demurrer to the declaration. If the defendant would object to the plaintiff's writ, he must do it by pleading in abatement. If he had so pleaded in this case, it is possible that the objection might have prevailed; for when a statute has prescribed the form of a writ, I am not prepared to say that a clerk or attorney has authority to vary from that form. The defendant, by appearing and answering to the declaration, has, according to the established and well-known rules of pleading, waived all objections to the writ.

Parsons, C. J. Notwithstanding the defendant, by having taken the oath prescribed for poor prisoners, has been liberated from imprisonment on the execution issued upon the judgment disclosed in this count; yet an action of debt lies on this judgment, because the statute provides that it shall remain in force to all intents and purposes; but the debtor's body, his wearing apparel and tools, shall not be liable to execution.

In this case the writ commands the sheriff to attach the defendant's estate, and to summon him to answer; and in the declaration the plaintiff has averred that the defendant has had the benefit of the poor debtor's oath. There is a demurrer to the declaration. The defendant has assigned several causes of demurrer. One is, that the sheriff is commanded to attach the defendant's estate, without excepting his wearing apparel. This is an exception to the writ, the defects of which, when not apparent on the record, must be shown by a plea in abatement. But if the writ be bad and insufficient upon the face of it, the court may, *ex officio*, quash it. The defendant insists that the statute of 1784, c. 28, prescribing the form of original writs, has not authorized the writ in this case; that, pursuant to the statute, an original writ in debt must be either against the estate and body of the defendant, or only a summons to appear, and that this writ pursues neither of the forms.

The statutes have, in several cases, prescribed the outlines of the forms of several writs, but not of all the writs in use. Where the legal remedy sought by the plaintiff may be obtained by a writ conforming to these outlines, he must sue out such a writ; and if the writ he shall sue materially vary from those outlines, the court may, *ex officio*, abate it. But when the remedy he is entitled to cannot be obtained by any writ conforming, in its outlines, to those prescribed by statute, it has been the ancient and constant practice of the court to grant him a writ, by which he may obtain his remedy. Thus we have no form of writs of error, of review, or of *scire facias* against bail, or of execution in dower where a woman has been divorced *a vinculo*; and yet, when the remedy sought required any writ of these kinds, the court have always granted it. By an ancient English statute, the masters in chancery, whence all original writs issued, were authorized to form new writs in new cases, that there might not be a failure of justice. In this State that authority, when necessary, has been exercised by the court issuing the writ. Thus, when an act passed, directing that an execution should not issue against the body of a sheriff when in office, the court altered the form of the execution given by statute, so as to conform it to this act. By the constitution, no representative shall be arrested

or held to bail on mesne process, while attending the General Court, or *eundo et redeundo*; but his estate may be attached, and when the plaintiff would attach his estate to secure his debt, a writ of attachment may issue, by which the officer is commanded to attach the estate of the defendant, and to summon him. By law, executions do not lie against the bodies or estates of executors or administrators, on judgments against them for the debts of the deceased; and executions have been made conformable to this provision of law. So by statute of 1783, c. 32, s. 9, writs of attachment shall run only against the goods or estate of the party deceased, in the hands of his executors or administrators, and not against their bodies. According to this section, and a former provincial law, of which it is a revision, writs have frequently issued, commanding the officer to attach the goods or estate of a person deceased, and to summon the executor or administrator.

In the case at bar, if the plaintiff had sued out a common writ of attachment against the estate and body of the defendant, the writ, on plea, might have been abated; if he had sued an original summons, by that he could not have secured the debtor's estate to satisfy his judgment. A writ, therefore, in this form is the only writ adequate to the remedy, to which by law he is entitled.

In a case like the present, the plaintiff having sued an attachment in this special form, he has done right in showing the exemption of the defendant's body, in order to entitle himself to this special writ. If he had sued a common writ of attachment against the defendant's body and estate, it could not be abated, but by the defendant's plea; for the exemptions being in his favor, he may waive the benefit of them. If he had sued an original summons, the writ could not have been abated; but the defendant, to avail himself of these exemptions, might have pleaded them, so as to cause an execution to issue with the exemptions pleaded. But if the plaintiff has gratuitously inserted in his declaration allegations, which will entitle him to this special writ, it cannot give the defendant any cause of complaint.

And the objection that, upon these principles, the plaintiff ought, in his writ, to have excepted from attachment the defendant's wearing apparel and his tools, does not appear to me to have much weight. It sufficiently appears that the plaintiff is entitled to a writ of attachment against the defendant's goods or estate; and the precept to the sheriff must be construed to extend to such estate only as is by law liable to attachment on this writ. Thus a *fiere facius* at common law is issued against the goods and chattels of the debtor without any exception; but if the sheriff were to strip the

debtor's wearing apparel from his body, he would be a trespasser, for such apparel, when worn, is not liable to the execution. Also, by the statute of 1805, c. 100, certain chattels therein described cannot be attached upon any original writ; yet the writ of attachment issues in the usual form, without including an exception of these chattels.

The causes of demurrer, which apply to the declaration, appear to me to be insufficient. It is enough, in a case like this, to allege the discharge in general terms; and if an *alias* execution had issued, and was not returnable, the defendant ought to have shown it.

It is the opinion of the court that the declaration is good.

Allen, for the plaintiff.

*Take*

## SCOPE AND CHARACTERISTICS OF CASE.

For what injuries does an action on the case lie?

We shall deal in answering this question with three distinct groups of cases.

Group (a). The distinctive characteristics of case — its undisputed territory.

Group (b). The border-land between case and equity.

Group (c). The border-land between case and trespass.

The first group will be satisfying; it will enunciate a clear distinction between trespass on the case and trespass: trespass is the remedy for a *direct* injury to the plaintiff's person or property; case, for an *indirect* and *consequential* injury to the plaintiff's person, property, or other right. The second and third groups will at first blush be confusing. The second group will deal with the relationship between equity and case. In *Ashby v. White*, Holt, C. J., says: "Where the common law gives a right, it gives a remedy to assert that right." In *Bird v. Randall*, Lord Mansfield says: "An action on the case is founded on the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so." Does this mean that between the realms of case and equity there lies an undefined, neutral ground?

The third group of cases deals with the doubtful border-land between trespass on the case and trespass. In *Reynolds*

*v. Clark*, an action on the case, the Chief Justice says: "We must keep up the boundaries of actions or we shall introduce the utmost confusion." In *Slater v. Baker*, an action on the case, the court say: "It is said the defendants ought to have been charged as trespassers *vi et armis*; the court will not look with eagle's eyes to see whether the evidence applies exactly or not to the case." Are these inconsistent statements? Does the second tend to break down the barrier between trespass on the case and trespass; a barrier which the first seems clearly to recognize?

One thing is certain at the start: trespass on the case historically was created to occupy other fields than those of trespass; and the question is, has case been forced beyond its early confines into territory that was pre-empted before actions on the case were ever heard of?

(a) *The Distinctive Features of Case.*

QUICK *et ux.* *v.* CUTTER.

COURT OF COMMON PLEAS, CHARLESTOWN. 1692-93.

REPORTED STEARNS ON REAL ACTIONS, 501.

John Quick of London and Elizabeth his wife, by their attorney, John Carthew, plaintiffs, *v.* William Cutter, defendant: In a plea of trespass on the case, for that the said William Cutter doth withhold and detain from the plaintiffs, in the right of the said Elizabeth, the possession of twenty acres of land, be the same more or less, bounded, etc., and of one messuage house, wherein the said William Cutter doth now inhabit and dwell, and one barn, garden, yard, and orchard, and also one water corn-mill and the appurtenances thereto appertaining, etc. Both parties appearing, the plaintiffs were nonsuited; for that an action of trespass on the case lieth not in this case. The plaintiffs appealed to the next Superior Court, etc.

[This is the earliest case which has been noticed (in Massachusetts) of an exception to the form of the writ being allowed. The court considered it an action of trespass, and not an action on the case. Stearns, Real Actions, 501.]



BUTTERFIELD v. FORRESTER. - *care*

IN THE KING'S BENCH. 1809.

REPORTED 11 EAST, 60. 1809.

In case for negligence, two things are requisite: (1) negligence on the defendant's part: (2) due care on the plaintiff's.

This was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, etc. At the trial before Bayley, J., at Derby, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the roadside at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at 100 yards distance; and the witness, who proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it; the plaintiff, however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence Bayley, J., directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant; which they accordingly did.

Vaughan, Serjt., now objected to this direction, on moving for a new trial; and referred to Buller's Ni. Pri. 26,<sup>1</sup> where the rule is laid down, that "if a man lay logs of wood across a highway, though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me, I may bring an action."

Bayley, J. The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

Lord Ellenborough, C. J. A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail

<sup>1</sup> The book cites Carth 194 and 451, in the margin, which references do not bear on the point here in question.

himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

*Per curiam.*

Rule refused.

### BEDINGFIELD *v.* ONSLOW.

IN THE COMMON PLEAS. 1603, ✓

REPORTED 3 LEVINZ, 209.

Case lies by a reversioner for an indirect injury to his reversion.

Case brought, and declares, that he was seised in fee of a close, and the defendant possessed of another close next adjoining, between which closes ran a rivulet, and that the defendant stopped the rivulet, whereby he surrounded and drowned the plaintiff's close, so that the timber trees (of the plaintiff's), namely, an hundred timber trees of oak, and an hundred of ash, became putrified, rotten, and perished. The defendant pleads, that one Studman, long before the time when, etc., and at the time when, etc., was possessed of the said close by virtue of a lease to him thereof made by the plaintiff's father, and that he had paid to Studman 20s. which he had accepted in satisfaction of the said trespass. Whereupon the plaintiff demurs; and after arguments at the bar, and on consideration of the books of 19 Hen. VI. 12; 12 Hen. VI. 4; 2 Rol. Abr. 551; Cro. Eliz. 55. Love against Piggot; it was resolved by Charlton, Levinz, and Street, who only were in court, that this was no plea; for the plaintiff, in respect of the prejudice done to the reversion, may maintain an action; and also Studman in respect of the possession, and so another may in respect of the shade, shelter, and fruit of the trees, for the same trespass; and the satisfaction given to one is no bar to the other. But trespass during the plaintiff's term could not be had, it being founded merely on the possession.

SCOTT *v.* SHEPHERD.

IN THE COMMON PLEAS. 1773.

REPORTED 2 WILLIAM BLACKSTONE, 892.

Trespass lies for a direct injury to plaintiff's person.

Trespass and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes that he lost the sight of it, whereby, etc. On not guilty pleaded, the cause came on to be tried before Nares, J., last Summer Assizes, at Bridgewater, when the jury found a verdict for the plaintiff with £100 damages, subject to the opinion of the court on this case: — On the evening of the fair day at Milborne Port, 28th October, 1770, the defendant threw a lighted squib, made of gunpowder, etc., from the street into the market-house, which is a covered building, supported by arches, and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, etc. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it across the said market-house, when it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and, in so throwing it, struck the plaintiff then in the said market-house in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes. *Quære.* If this action be maintainable?

This case was argued last term by Glyn, for the plaintiff, and Burland, for the defendant; and this term, the court, being divided in their judgment, delivered their opinions *seriatim*.

Nares, J., was of opinion, that trespass would well lie in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has, by statute Westm. 3, been since made a nuisance. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate. 21 Hen. VII. 28, is express that *malus animus* is not necessary to constitute a trespass. So, too, 1

Stra. 596; Hob. 134; T. Jones, 205; 6 Edw. IV. 7, 8; Fitzh. Trespass, 110. The principle I go upon is what is laid down in Reynolds and Clark, Stra. 634, that if the act in the first instance be unlawful, trespass will lie. Wherever therefore an act is unlawful at first, trespass will lie for the consequences of it. So, in 12 Hen. IV. trespass lay for stopping a sewer with earth, so as to overflow the plaintiff's land. In 26 Hen. VIII. 8, for going upon the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Hardr. 60; Reg. 108, 95; 6 Edw. IV. 7, 8; 1 Ld. Raym. 272; Hob. 180; Cro. Jac. 122, 43; F. N. B. 202, [91, G]. I do not think it necessary to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient.—*Qui facit per aliud facit per se*. He is the person, who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in the King and Huggins, 2 Lord Raym. 1574; Parkhurst and Foster, 1 Lord Raym. 480; Rosewell and Prior, 12 Mod. 639. And it was declared by this court, in Slater and Baker, M. 8 Geo. III. 2 Wils. 359, that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case; but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

Blackstone, J., was of opinion, that an action of trespass did not lie for Scott against Shepherd upon this case. He took the settled distinction to be, that where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case: Reynolds and Clarke, Lord Raym. 1401, Stra. 634; Haward and Bankes, Burr. 1114; Harker and Birkbeck, Burr. 1559. The lawfulness or unlawfulness of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in Stra. 635, where it can only mean, that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain; but as it was a lawful act (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule; for it is held by the court in the same case, that if I throw a log of timber into the highway (which is an unlawful act), and

another man tumbles over it, and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass, because it is an immediate wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbor's ground, and I go thereon to fetch it, trespass lies. This is the case cited from 6 Edw. IV. 7. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognizance thereby, I shall have an action on the case; *per* Powell, J., 11 Mod. 180. Yet here the original act was unlawful, and in the nature of trespass. So that lawful or unlawful is quite out of the case; the solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on the other. And trespass never lay for the latter. If this be so, the only question will be, whether the injury which the plaintiff suffered was immediate, or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal, or Scott. The tortious act was complete when the squib lay at rest upon Yates's stall. He, or any bystander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others. But Shepherd, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed upon it, and the new direction given it, by either Willis or Ryal; who both were free agents, and acted upon their own judgment. This differs it from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the *vis impressa*, is continued, though diverted. Here the instrument of mischief was at rest, till a new *impetus* and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still. Yet if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against Shepherd. And, according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act! nay, it may be extended *in infinitum*. If a man tosses a football into the

street, and, after being kicked about by one hundred people, it at last breaks a tradesman's windows; shall he have trespass against the man who first produced it? Surely only against the man who gave it that mischievous direction. But it is said, if Scott has no action against Shepherd, against whom must he seek his remedy? I give no opinion whether case would lie against Shepherd for the consequential damage; though, as at present advised, I think, upon the circumstances, it would. But I think, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house, instead of brushing it down, or throwing [it] out of the open sides into the street (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person; — nothing but inevitable necessity; Weaver and Ward, Hob. 134; Dickenson and Watson, T. Jones, 205; Gilbert and Stone, Al. 35, Styl. 72. So in the case put by Brian, J., and assented to by Littleton and Cheke, C. J., and relied on in Raym. 467. — “If a man assaults me, so that I cannot avoid him, and I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavoring to defend myself.” But none of these great lawyers ever thought that trespass would lie, by the person struck, against him who first assaulted the striker. The cases cited from the Register and Hardres are all of immediate acts, or the direct and inevitable effects of the defendants' immediate acts. And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act. — But what is his own immediate act? The throwing the squib to Yates's stall. Had Yates's goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market-house by Willis is neither the act of Shepherd, nor the inevitable effect of it; much less the subsequent throwing by Ryal. Slater and Barker was first a motion for a new trial after verdict. In our case the verdict is suspended till the determination of the court. And though after verdict the court will not look with eagle's eyes to spy out a variance, yet, when a question is put by the jury upon such a variance, and it is made the very point of the cause, the court will not wink against the light, and say

that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. 2. It was an action on the case that was brought, and the court held the special case laid to be fully proved. So that the present question could not arise upon that action. 3. The same evidence that will maintain trespass may also frequently maintain case but not *e converso*. Every action of trespass with a *per quod* includes an action on the case. I may bring trespass for the immediate injury, and subjoin a *per quod* for the consequential damages; — or may bring case for the consequential damages, and pass over the immediate injury, as in the case from 11 Mod. 180, before cited. But if I bring trespass for an immediate injury, and prove at most only a consequential damage, judgment must be for the defendant; Gates and Bailey, Tr. 6 Geo. III. 2 Wils. 313. It is said by Lord Raymond, and very justly, in Reynolds and Clarke, “We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion.” As I therefore think no immediate injury passed from the defendant to the plaintiff (and without such immediate injury no action of trespass can be maintained), I am of opinion, that in this action judgment ought to be for the defendant.

Gould, J., was of the same opinion with Nares, J., that this action was well maintainable. — The whole difficulty lies in the form of the action, and not in the substance of the remedy. The line is very nice between case and trespass upon these occasions; I am persuaded there are many instances wherein both or either will lie. I agree with Brother Nares, that wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him, if the consequence be in nature of trespass. But, exclusive of this, I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff’s face. The terror impressed upon Willis and Ryal excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant’s unlawful act. Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequences. What Willis and Ryal did, was by necessity, and the defendant imposed that necessity upon them. As to the case of the football, I think that if all the people assembled act in concert, they are all trespassers. 1. From the general mischievous intent. 2. From the obvious and natural consequences of such an act: which reasoning will equally apply to the case before us. And that actions of trespass will lie for the mischievous consequences of another’s act, whether lawful or unlawful, appears

from their being maintained for acts done in the plaintiff's own land : Hardr. 60 ; Courtney and Collet, 1 Lord Raym. 272. I shall not go over again the ground which Brother Nares has relied on and explained, but concur in his opinion, that this action is supported by the evidence.

De Grey, C. J. This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my Brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act ; for actions of trespass will lie for legal acts when they become trespasses by accident ; as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, etc. — They may also not lie for the consequences even of illegal acts, as that of casting a log in the highway, etc. — But the true question is, whether the injury is the direct and immediate act of the defendant ; and I am of opinion, that in this case it is. The throwing the squib was an act unlawful and tending to affright the bystanders. So far, mischief was originally intended ; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it ; — *Egreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows ; if done with a deliberate intent, the consequence may amount to murder ; if incautiously, to manslaughter ; Fost. 261. So, too, in 1 Ventr. 295, a person breaking a horse in Lincoln's Inn Fields hurt a man ; held, that trespass lay : and, 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequent to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable ; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95 *a*, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate



act need not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged, that the intervention of a free agent will make a difference ; but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with Brothers Gould and Nares, that the present action is maintainable.

*Postea* to the plaintiff,

(b) *The Border Land between Case and Equity.*

ASHBY *v.* WHITE *et al.*

IN THE QUEEN'S BENCH. 1703. =

REPORTED 1 SALKELD, 19.

When there is a right, the law will give a remedy to vindicate that right.

*the action of the case may be brought.*

Action upon the case against the constables of Aylesbury, and declares that the king's writ issued and was delivered to the sheriff of Bucks for election of knights of the shire and burgesses of boroughs, to serve in parliament; whereupon the sheriff made out his precept to the defendants, being constables of Aylesbury, for the election of two burgesses for that borough, which was delivered, and the burgesses duly assembled to choose, etc., and that the plaintiff being duly qualified, etc., offered to give his voice for Sir T. Lee, and S. Mayne, Esq., but the defendants obstructed him from voting, and refused and would not receive his vote, nor allow it. Upon not guilty, a verdict was found for the plaintiff, and after motion in arrest of judgment the court gave their opinions *seriatim.* (*severally + in order*)

Gould, J., Powys, J., and Powell, J., held the action not maintainable.

Holt, C. J., *contra*. He held that the plaintiff had a right to vote; that a freeholder has a right to vote by reason of his freehold, and it is a real right; and the value of his freehold was not material, till 8 H. 6, c. 7, which requires it should be 40s. *per annum*; that in boroughs they have a right to vote *ratione burgagii*: And that in cities and corporations it is a personal inheritance, and vested in the whole corporation, but to be used and exercised by the particular members, and that such a franchise cannot be granted but to a corporation. Hob. 14; 12 Co. 120; Mo. 812. And this is not a *minimum in lege*, but a noble privilege, which entitles the subject to a share in the government and legislature. No laws can

be made to affect him or his property but by his own consent, given in person if he be chosen, or by his representative if he is a voter. That if the plaintiff has a right, he must in consequence have a remedy to vindicate that right: for want of right and want of remedy is the same thing. If a statute gives a right, the common law will give a remedy to maintain that right; *a fortiori*, where the common law gives a right, it gives a remedy to assert it. This is an injury, and every injury imports a damage. Violating the right of another by a scandalous word is sufficient damage to give an action, though the party suffers not a farthing, and the pecuniary loss be nothing. Where parliamentary matters come before us, as incident to a cause of action on the property of the subject, which we in duty must determine, though the incident matter be parliamentary, we must not be deterred, but are bound by our oaths to determine it. There can be no such method by petition as my brother Powell<sup>1</sup> speaks of; nor can the parliament judge of this injury, nor give damages to the plaintiff for it. But judgment was given for the defendant.

Note: On Friday the 14th of January, 1703, this judgment was reversed in the House of Lords. Trevor, C. J., and Price and sixteen Lords concurred with the three judges in B. R. The rest of the judges and fifty Lords concurred with Holt, C. J. Although this matter relates to the parliament, yet it is an injury precedaneous to the parliament, as my Lord Hale said in the cause of *Barnardiston v. Soame*.

[The student may with profit study the case of *Ashby v. White* as reported in 2 Ld. Raym. 938, and Holt's Rep. 524. Salkeld's report *supra*, however, brings out with striking vividness the great truth of the case — "Where there is a right, there is a remedy."]

### BIRD *v.* RANDALL.

IN THE KING'S BENCH. 1762.

REPORTED 3 BURROWS, 1345.

Trespass on the case resembles in nature a bill in equity.

This was a case reserved at *nisi prius* at Guildhall, upon a trial before Lord Mansfield, in an action upon the case wherein a verdict was given for the plaintiff, and twenty pounds damages assessed; but subject to the opinion of the court, upon a case stated.

<sup>1</sup> Powell, J., had urged "that the right of election of members must depend upon the right of the electors; and the former the parliament are to decide, and the plaintiff may petition the parliament to determine it; and after that may have his action, but not before; and therefore was not without a remedy."

The substance of the case stated was shortly this.

The plaintiff Bird and one Mary Hogg were silk-dressers, and partners in trade. And articles of agreement were entered into between the plaintiff Bird and one Burford, dated 25th of August, 1760; whereby Burford covenanted with Bird to serve the plaintiff Bird and the said Mary Hogg and the survivor of them, as a journey-man in their said trade and business of silk-dressers, for five years from the date; and to work at the usual and accustomed hours daily, and not to discover the mysteries of the trade, or the secrets of the plaintiff and his said partner; and Bird covenanted to pay Burford weekly twenty shillings a week for his work. And for the true performance of all and every the covenants and agreements contained in the articles, each party bound himself to the other in the penalty of one hundred pounds.

The case then goes on, and states that Burford accordingly entered into the said service, under the said articles; and that he continued therein till 19th of September, 1761; when the defendant, knowing of the said articles, persuaded, procured, and enticed him to depart from and out of it: and he accordingly did so; and never returned again into it.

It further states that the plaintiff Bird, in Trinity vacation 1761, and before the commencement of the present action against Randall, brought an action of debt against Burford for the penalty of one hundred pounds for his departing out of the said service; and obtained a verdict and judgment against him in the said action, and recovered the said money, with costs; but the said moneys (the debt and costs) so recovered were not actually paid to him by the said Burford, till the 29th of March, 1762; which was after the commencement of the present action, but before it came on to be tried.

The present action (which is an action of trespass upon the case) is brought by the same plaintiff Bird against the present defendant Randall, for the enticing and seducing the said Burford out of the plaintiff's service.

The question was, "Whether the present action be maintainable or not, under the circumstances of this case."

The court took time to consider, till this day. And now

Lord Mansfield delivered the resolution of the court.

This case turned, he said, upon two points: 1st. Whether the plaintiff could have maintained this action against the defendant for seducing his servant, if the one hundred pounds penalty before recovered by him against the servant himself had been actually received by him before the commencement of the present action

against the seducer;<sup>1</sup> 2dly. If it could not, then whether his having received it subsequent to the commencement of the present action be such a circumstance as will vary the case, so as to entitle him to maintain his action, which he could not have maintained, if the actual receipt had been prior to the commencement of it.

2d Point. But taking it, as this case was, "That he had not actually received it of the servant till after the commencement of the present action;" let us see whether this circumstance will vary the case.

Several arguments were drawn by the counsel for the defendant, from cases of joint trespassers and joint contracts; which were urged as being applicable to the present question. But they were sufficiently answered by Mr. Solicitor-General.

There, the recovery is against them all, for the same thing; and there is no analogy at all between those cases and this. In those cases there is a recovery of the selfsame thing, for a joint injury: the defendants are all of them liable to the plaintiff, and he may proceed against any, or all of them, if he pleases; as it is but one trespass, one contract, and all are liable. Yet he shall have but one satisfaction from them all.

Another essential difference between those cases upon torts and actions upon the case is, that those are actions *stricti juris*; and therefore such a former recovery, release, or satisfaction cannot be given in evidence, but must be pleaded; but an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and, in effect, is so; and therefore such a former recovery, release or satisfaction need not be pleaded, but may be given in evidence. For whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only.

Whether he could have recovered in an action commenced against the present defendant, after having recovered the penalty from the servant, but without having actually received the money so recovered from the servant, I will not now determine: I should have doubted of it, extremely.

But here, the penalty recovered by him from the servant was actually received by him before the present action came on to be tried; without any sort of difficulty. He might have received it,

<sup>1</sup> Matter relating to the first point is here omitted. Matter relating to the second point is much abridged.

when he would: but he chooses to lie by, till he has brought his action against a third person, who would not have been liable to anything, if the plaintiff had received the money of the servant in due time; and then receives it of the first defendant, and afterwards proceeds in this action to recover it against the second defendant; which is against conscience. Therefore in such an action as this is (an action of equity, not a formed action *stricti juris*), it is enough if it appears upon the evidence that the plaintiff ought not in conscience to recover it.

If he had actually recovered it, through the defendant's not knowing "That the penalty had been paid," an action would lie against him, for money had and received: like the case out of the court of conscience, not long since determined in this court.<sup>1</sup>

As the plaintiff has already received, from the servant, more than ample satisfaction for the injury done him, he cannot afterwards proceed against any other person for a further satisfaction.

And my brother Denison suggests to me that the court would, upon the application of the present defendant, by way of motion, have stayed the plaintiff's proceeding further against him, upon the defendant's showing them "That the plaintiff had actually received the money recovered by him in his former action against the servant."

*Per cur.* Let the *postea* be delivered to the defendant.

### WINSMORE v. GREENBANK.

IN THE COMMON PLEAS. 1745.

REPORTED WILLES, 581.

New facts must exist in every special action on the case.

"Skinner, Willes, and Hayward, Serjts., moved for a new trial upon several affidavits, setting forth (as they were opened) that the verdict was against evidence, and the damages excessive, being £3000.

"The action was an action on the case for enticing away and detaining the plaintiff's wife, which were laid in the declaration with several other particular circumstances; but my Brother Abney, who tried the cause, being in court, and certifying that the verdict was not against evidence, nor the damages excessive, and that he was not dissatisfied with it, we would not make any rule, nor did we suffer the affidavits to be read.

"Hayward likewise mentioned another objection: that the judge

<sup>1</sup> *Moses v. Macfarlan*, 3 Burr. 1005.

would not allow the declarations of the wife to be given in evidence on either side, but the two senior counsel would not insist on that objection, and

"My Brother Burnett and I were of opinion that my Brother Abney did right in refusing to admit such evidence."

———"They then moved, in arrest of judgment."

Willes, Lord Chief Justice, delivered his opinion to the following effect:

The first general objection is, that there is no precedent of any such action as this, and that therefore it will not lie; and the objection is founded on Lit. s. 108, and Co. Lit. 81, b, and several other books. But this general rule is not applicable to the present case; it would be if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy; but there must be new facts in every special action on the case.

Mr. J. Abney, and Mr. J. Burnett, gave their opinions *seriatim* agreeing with the Lord Chief Justice. Rule discharged.<sup>1</sup>

## HOW FAR DID THE STATUTE OF WESTMINSTER II. GIVE "A PLAIN AND ADEQUATE REMEDY"?

"It has been said by high authority that the principle that courts of chancery will not interfere when there is a complete and adequate remedy at law is as old in English equity jurisprudence as the earliest period of its recorded history. . . .

"By the terms of the rule, in order to exclude jurisdiction in equity, the remedy at law must be 'plain, adequate, and complete.' To follow the language of the United States Supreme Court, 'It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as [is] the remedy in equity.'"<sup>2</sup> Merwin, Equity, 29, 31.

"The act<sup>3</sup> permitted the framing of new writs in cases 'falling under like law and requiring like remedy' with the existing ones. Upon this permissive language the courts put a highly restrictive meaning. As the common-law forms of action gave only three [?] different kinds of remedies, every remedy obtained through the means of the new writs must be like one of these three species.

<sup>1</sup> The pleadings and part of the opinion are omitted.

<sup>2</sup> Boyce's Exrs. v. Grundy, 3 Peters, 210.

<sup>3</sup> The Statute of Westminster II.

Thus at one blow all power was denied of awarding to suitors any special equitable relief which did not fall within one or the other of these three classes, and parties who required such special forms of remedy were still compelled to seek them from another tribunal. The same was true, irrespective of the particular kinds of relief, of all cases which might arise, quite dissimilar in their facts and circumstances from those to which the existing forms of action applied; not falling under 'like law,' they were held to be without the scope of the statute, and the complainants could obtain no redress from the common-law courts.

"The statute only provided for new writs on behalf of plaintiffs. As civilization progressed, and the relations of men grew more intricate from increase of commerce, trade, and other social activities, new defences as well as new causes of action constantly arose. Although these were not within the letter of the act, they were fairly within its spirit. But the law courts adhered to the letter, and ignored the spirit. If, therefore, the new matter of defence did not fall within the prescribed formulas of the legal actions, and did not conform to the established rules defining legal defences, the party must seek relief in some manner from the jurisdiction of the chancellor.

"Although the statute authorized the 'clerks of chancery' to frame the new writs, and seemed by implication to confer upon them the absolute powers with respect to the matter which, it was conceded, were held by parliament, still the common-law judges assumed for themselves the same exclusive jurisdiction to pass upon the propriety and validity of the new writs which they had always exercised over those issued by the clerks prior to the statute. They did not regard the action of the chancery officials in sanctioning a writ which would give a new remedial right to the plaintiff as at all binding, and in fact rejected all the new writs contrived in pursuance of the statute, which did not closely conform to some one of the existing precedents. The chancery clerks, being ecclesiastics and acquainted with the Roman law, seem to have fashioned most of their new writs in imitation of the Roman formulæ; but all these innovations upon the established methods the law courts refused to accept." Pomeroy, Equity, ss. 26, 27, 28.

### CONFLICTING VIEWS OF MODERN WRITERS.

"It is often alleged that by a liberal construction of this statute (**Westminster II.**), the need for the chancellor's extraordinary jurisdiction would have been avoided. Austin with characteristic vigor

of language says that 'Equity arose from the sulkiness and obstinacy of the common-law courts, which refused to suit themselves to the changes which took place in opinion and in the circumstances of society.' Blackstone writes to the same effect: this 'provision (with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ) might have effectually answered all the purposes of a court of equity, except that of obtaining discovery by the oath of the defendant;' and the idea is not confined to modern writers, for a judge of the reign of Edward VI. said that, 'the subpoena (the equity process) would not be so often used as it is, if we paid heed to actions upon the case.' . . . The suggestion is, however, an unfounded one. . . . It is not true that without wholly revolutionizing their procedure, as well as extending their jurisdiction, the courts could have afforded the kinds of relief that equity ultimately gave." Kerr, *Equity Jurisprudence*, 11, 12.

(c) *The Border Land between Case and Trespass.*

SLATER *v.* BAKER AND STAPLETON.

IN THE COMMON PLEAS. 1767.

REPORTED 2 WILSON, 359.

11 ( Case lies for a negligent but direct application of force to plaintiff's person.

Special action upon the case, wherein the plaintiff declares that the defendant Baker being a surgeon, and Stapleton an apothecary, he employed them to cure his leg, which had been broken and set, and the callous of the fracture formed; that in consideration of being paid for their skill and labor, etc., they undertook and promised, etc., but the defendants not regarding their promise and undertaking, and the duty of their business and employment, so ignorantly and unskilfully treated the plaintiff that they ignorantly and unskilfully broke and disunited the callous of the plaintiff's leg after it was set, and the callous formed, whereby he is damaged. The defendants pleaded not guilty, whereupon issue was joined, which was tried before the Lord Chief Justice Wilmot, and a verdict found for the plaintiff, damages £500. The substance of the evidence for the plaintiff at the trial was, first, a surgeon was called, who swore that the plaintiff having broken both the bones of one of his legs, this witness set the same, that the plaintiff was under his hands nine weeks, that in a month's time after the leg was set, he found the leg was healing and in a good way; the callous was



formed, there was a little protuberance, but not more than usual; upon cross-examination he said he was instructed in surgery by his father, that the callous was the uniting the bones, and that it was very dangerous to break or disunite the callous after it was formed.

John Latham, an apothecary, swore he attended the plaintiff nine weeks, who was then well enough to go home, that the bones were well united, that he was present with the plaintiff and defendants, and at first the defendants said the plaintiff had fallen into good hands; the second time he saw them all together the defendants said the same, but when he saw them together a third time there was some alteration, he said the plaintiff was then in a passion, and was unwilling to let the defendants do anything to his leg; he said he had known such a thing done as disuniting the callous, but that had been only when a leg was set very crooked; but not where it was straight.

A woman called as a witness swore that when the plaintiff came home he could walk with crutches, that the defendant Baker put on to the plaintiff's leg an heavy steel thing that had teeth, and would stretch or lengthen the leg, that the defendants broke the leg again, and three or four months afterwards the plaintiff was still very ill and bad of it.

The daughter of the plaintiff swore that the defendant Stapleton was first sent for to take off the bandage from the plaintiff's leg, when he came he declined to do it himself, and desired the other defendant Baker might be called in to assist; when Baker came he sent for the machine that was mentioned; plaintiff offered to give Baker a guinea, but Stapleton advised him not to take it then, but said they might be paid all together when the business was done; that the third time the defendants came to the plaintiff, Baker took up the plaintiff's foot in both his hands and nodded to Stapleton, and then Stapleton took the plaintiff's leg upon his knee, and the leg gave a crack when the plaintiff cried out to them and said, "You have broke what nature had formed;" Baker then said to the plaintiff, "You must go through the operation of extension," and Stapleton said, "We have consulted and done for the best."

Another surgeon was called and swore that in cases of crooked legs after they have been set, the way of making them straight is by compression and not by extension, and said he had not the least idea of the instrument spoken of for extension; he gave Baker a good character, as having been the first surgeon of St. Bartholomew's Hospital for twenty years, and said he had never known a case where the callous had deossified.

Another surgeon was called who swore that when the callous is formed to any degree it is difficult to break it, and the callous in this case must have been formed, or it would not have given a crack, and said extension was improper, and if the patient himself had asked him to do it, he would have declined it, and if the callous had not been hard he would not have done it without the consent of the plaintiff, that compression was the proper way, and the instrument improper; he said the defendant Baker was eminent in his profession. Another surgeon was called who swore that if the plaintiff was capable of bearing his foot upon the ground, he would not have disunited the callous if he had been desired by him, but in no case whatever without consent of the patient; if the callous was loose, it was proper to make the extension to bring the leg into a right line. A servant of the plaintiff swore the plaintiff had put his foot upon the ground three or four weeks before this was done.

The counsel for the defendants at the trial for Baker relied upon the good character which was given him, and objected there was no evidence to affect the other defendant Stapleton the apothecary; but the Lord Chief Justice thought there was such evidence against both the defendants as ought to be left to the jury, as the nodding, the advising Baker not to take the guinea offered to him by the plaintiff, besides the apothecary first proposed sending for Baker; the plaintiff was in no pain before they extended his leg, and he only sent to Stapleton to have the bandage taken off; the Lord Chief Justice asked the jury whether they intended to find the damages against both the defendants, and they found £500 against them jointly, and he said he was well satisfied with the verdict.

It was now moved that the verdict ought to be set aside because the action is upon a joint contract, and there is no evidence of a joint undertaking by both the defendants; the plaintiff sends for Stapleton to take off the bandage, who declines doing it, and says, "I do not understand this matter, you must send for a surgeon;" accordingly Mr. Baker is sent for, who enters upon the business as a surgeon unconnected with Stapleton, who, it does not appear, ever undertook for any skill about the leg, so the jury have found him guilty without any evidence. That Baker has been above twenty years the first surgeon in St. Bartholomew's Hospital, reads lectures in surgery and anatomy, and is celebrated for his knowledge in his profession as well as his humanity; and to charge such a man with ignorance and unskilfulness upon the records of this court is most dreadful; all the witnesses agreed Mr. Baker doth not want knowledge, therefore this verdict ought not to stand. 2dly, It was ob-

jected that the evidence given does not apply to this action, which is upon a joint contract; the evidence is that the callous of the leg was broke without the plaintiff's consent; but there is no evidence of ignorance or want of skill, and therefore the action ought to have been trespass *vi & armis* for breaking the plaintiff's leg without his consent; all the surgeons said they never do anything of this kind without consent, and if the plaintiff should not be content with the present damages, but bring another action of trespass *vi & armis*, could this verdict be pleaded in bar? The court without hearing the counsel for the plaintiff gave judgment for him.

2dly, It is objected that this was not the proper action, and that it ought to have been trespass *vi & armis*; in answer to this, it appears from the evidence of the surgeons that it was improper to disunite the callous without consent: this is the usage and law of surgeons; then it was ignorance and unskilfulness in that very particular to do contrary to the rule of the profession, what no surgeon ought to have done; and indeed it is reasonable that a patient should be told what is about to be done to him, that he may take courage and put himself in such a situation as to enable him to undergo the operation; it was objected, this verdict and recovery cannot be pleaded in bar to an action of trespass *vi & armis* to be brought for the same damage; but we are clear of opinion it may be pleaded in bar. That the plaintiff ought to receive a satisfaction for the injury seems to be admitted; but then it is said the defendants ought to have been charged as trespassers *vi & armis*; the court will not look with eagle's eyes to see whether the evidence applies exactly or not to the case, when they can see the plaintiff has obtained a verdict for such damages as he deserves, they will establish such verdict if it be possible. For anything that appears to the court this was the first experiment made with this new instrument, and if it was, it was a rash action, and he who acts rashly acts ignorantly; and although the defendants in general may be as skilful in their respective professions as any two gentlemen in England, yet the court cannot help saying that in this particular case they have [acted] ignorantly and unskilfully, contrary to the known rule and usage of surgeons.

Judgment for the plaintiff *per totam curiam*.<sup>1</sup>

<sup>1</sup> Matter not relating to the distinction between case and trespass is omitted.

REYNOLDS *v.* CLARKE.

IN THE KING'S BENCH. 1725.

REPORTED 1 STRANGE, 634.

The distinction between trespass and case.

Trespass for entering the plaintiff's yard and fixing a spout there, *per quod* the water came into the yard and rotted the walls of the plaintiff's house. The defendant justifies that before the trespass John Fountain was seised in fee of the plaintiff's house and yard, and two other houses adjoining, and demised the plaintiff's house and yard to one Tyler, except the free use of the yard and privy for the tenants of the other two houses jointly with the tenant of the plaintiff's house; then he shows how the house of the defendant, which was one of the two houses, came to him, and that he entered the yard and fixed the spout for his necessary use, to carry off the rain, *prout ei bene licuit*. The plaintiff demurs. And

Reeve *pro defendente* insisted that this exception amounted to a license of the party, and that a distinction has always been taken between a license in law, as to go into a tavern, and the license of the party, and that this being of the latter sort an action of trespass will not lie; but if the spout be a prejudice, the plaintiff must right himself by an action upon the case. 11 Co. The Six Carpenters' Case. This is an action of trespass brought for a nuisance upon our own possession.

*Et per* Chief Justice. Though he had a right to enter into the yard, yet it is considerable, whether if he abuses that right to the detriment of another, he is not in the same case with every other trespasser. *Et per* Fortescue, Justice. Trespass is a possessory action, and how does this invade the plaintiff's possession? The difference between trespass and case is that in trespass the plaintiff complains of an immediate wrong, and in case of a wrong that is the consequence of another act. *Et per* Raymond, Justice. That distinction is perfectly right. I remember a case in B. R. Courtney *v.* Collett, which was for the defendant's diverting his own water-course in his own land, *per quod* the plaintiff's land was overflowed; after a verdict *pro quer*, it was often debated whether this was an action of trespass or upon the case, and at last judgment was for the plaintiff, who had brought trespass only.

The court said it was a nice case, and therefore they gave not their opinion, but ordered an *ulterius concilium*.

After a second argument to the effect of the former, the court

delivered their opinions this term. Chief Justice. We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion ; if the act in the first instance be unlawful, trespass will lie ; but if the act is *prima facie* lawful (as it was in this case) and the prejudice to another is not immediate but consequential, it must be an action upon the case ; and this is the distinction. The case I mentioned the last time of Courtney v. Collett was a plain trespass, and the account I then gave of it from my memory was mistaken : it was Hil. 9 W. 3 in B. R. trespass for taking fishes, *necnon pro eo quod* he broke down the bank of the river, *per quod* the water issued and other fishes went away : after verdict for the plaintiff, it was moved in arrest of judgment that the latter part was case, and not joinable with trespass ; but the court held that was a trespass, and what came under the *per quod* was only matter of aggravation. There was another case in B. R. Hil. 8 Ann. Leveridge v. Hoskins. That was case for digging trenches, whereby the water was drawn away from the plaintiff's river ; it was moved in arrest of judgment that this was trespass ; but the court said that it not being laid to be a digging upon the plaintiff's ground, the action upon the case was most proper : and I take that and this to be the same case, the defendant having a right to enter the yard, and do the first act, which is here complained of, I think this should have been an action upon the case, and that trespass will not lie.

**Powys accord.** *Et per* Fortescue, Justice. Trespass will not lie for procuring another to beat me ; if a man throws a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate wrong ; but if as it lies there, I tumble over it, and receive an injury, I must bring an action upon the case ; because it is only prejudicial in consequence, for which originally I could have no action at all. *Et per* Reynolds, Justice. The distinction is certainly right ; this is only injurious in its consequence, for it is not pretended that the bare fixing a spout was a cause of action, without the falling of any water ; the right of action did not accrue till the water actually descended, and therefore this should have been an action upon the case.

*Per curiam,*

Judgment for the defendant.

GATES *v.* BAYLEY.

IN THE COMMON PLEAS, 1766.

REPORTED 2 WILSON, 313.

The distinction between trespass and case,

Trespass for taking and impounding the plaintiff's cattle and keeping them in the pound so closely confined together that by reason thereof one of the beasts died; the defendant first pleads the general issue to the whole declaration, and thereupon issue is joined; and, 2dly, a justification under the corporation of London that he took the cattle damage feasant and put them into the pound, as it was lawful for him to do; the plaintiff replies *de injuria sua propria*, and thereupon issue is joined; the jury gave a verdict for the plaintiff upon the general issue, and the value of his beasts that died in damages; upon the other issue on the justification they found for the defendant.

And now it was moved that judgment might be entered for the defendant, because the jury have found for him upon the justification, which covers the whole trespass in the declaration; and the beasts dying after being put into the pound is only gravamen, and does not make the defendant a trespasser *ab initio*; if the plaintiff can have any action for the loss of his beasts it must be case, and not trespass; the difference between trespass and case is, that in trespass the plaintiff complains of an immediate wrong, and in case, of a wrong that is the consequence of another act, *per* Fortescue, Justice, and by Raymond, Justice, That distinction is perfectly right. And by the Chief Justice, We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion; if the act, in the first instance, be unlawful, trespass will lie; but if the act is *prima facie* lawful (as it was in the case at bar) and the prejudice to another is not immediate but consequential, it must be an action upon the case; and this is the distinction. 1 Stran. 635. Reynolds *v.* Clarke, 2 Ld. Raym. 1402; s. c. 8 Mod. 272; s. c. that the *per quod* the cattle died, after impounding in trespass, is only aggravation. 1 Vent. 54. The only act done by the defendant in this case was the taking and impounding the cattle in the common pound, for doing damage; this the law gave him authority to do, and he did no other act whatever, and he cannot be charged in trespass for the death of the beast, which was a consequence and not an immediate malfeasance by the defendant; no man can be a trespasser for a nonfeasance; the law gave the six carpenters au-

thority to go into the tavern, but the not paying for the wine did not make them trespassers *ab initio*; the taverner might have his action of debt for the wine. 8 Rep. 146, 147. Trespass will not lie for taking an excessive distress, because the entry at first is lawful; the remedy in that case is by the stat. of Marlbridge, 2 Stran. 851; 3 Lev. 48, so that it is not every abuse of a distress that makes a man a trespasser *ab initio*.

For the plaintiff it was said that the justification gives no answer to the putting the cattle so closely together, whereby one died, and therefore the plaintiff ought to have judgment upon the issue found for him on the Not guilty; that it was a misfeasance in the first instance, and made the defendant a trespasser *ab initio*. *Sed non allocatur*.

*Curia*: The justification is an answer to the whole trespass in the declaration, which is only the taking and impounding; all the rest, as the dying of the beast, is only aggravation, if the plaintiff would have insisted that the defendant had abused the distress, he ought to have replied that after the said distress the defendant abused it so and so, and have concluded with an averment, and this would not have been a departure, because he who abuses a distress is a trespasser *ab initio*, according to the case of Gargrave v. Smith, 1 Salk. 221, and Bagshaw v. Gaward, Yelv. 96, 97.

Judgment for the defendant *per totam curiam*.

to p. 245.

## PITTS v. GAINCE AND FORESIGHT.

IN THE KING'S BENCH. 1700,

REPORTED 1 SALKELD, 10,

Action sur le case, for that he was master of a ship, and that it was laden with corn in such a harbor, ready to sail for Dantzick, and that the defendant entered and seized the ship and detained her, *per quod impeditus & obstructus fuit in viagio*. Defendant justified for toll and port duties; but his plea being naught, took this exception to the action, viz.: That it should have been trespass. *Vide* 4 Edw. III. 24; Palm. 47; 13 Hen. VII. 26. Holt, C. J. In the cases cited, the plaintiff had a property in the thing taken; but here the plaintiff has not a property; the ship was not the master's but the owner's; the master only declares as a particular officer, and can only recover for his particular loss. Yet he might have brought trespass as a bailiff of goods may; and then as a bailiff he could only have declared upon his possession, s. c. that he

was possessed; which is sufficient to maintain trespass. Judgment *pro quer*.<sup>1</sup>

SAMUEL DALTON *v.* JACOB FAVOUR, JR.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE. 1826.

REPORTED 3 NEW HAMPSHIRE, 465.

Trespass and case may, under certain circumstances, be concurrent remedies.

Trespass on the case, for that the said Favour, on the 27th September, 1825, at D., having in his hands a firelock, highly charged with powder, and a great quantity of wadding, so exceedingly carelessly managed his said firelock, that he discharged its contents into the foot of the plaintiff; whereby he was put to great pain, etc.

The cause was tried here, upon the general issue, at November Term, 1825; when it appeared in evidence, that the plaintiff was standing in an entry of a house in sight of the defendant, who was about six feet distant from him, when the defendant discharged the firelock and wounded the plaintiff in his foot; but it did not appear that the firelock was discharged with intent to injure the plaintiff, but the accident was the consequence of great carelessness,

Webster, for the defendant, objected, that case could not be supported on the facts proved in the case; but the court overruled the objection; and the jury having returned a verdict for the plaintiff, he moved the court to grant a new trial, on the same ground.

Smiley, for the plaintiff.

Richardson, C. J., delivered the opinion of the court.

The principles, upon which the decision of this case must depend, are well settled in the books.

In all cases, where the injury is done with force and immediately by the act of the defendant, trespass may be maintained. 1 Chitty's Pl. 122; 3 East, 593, *Leame v. Bray*; 19 Johns. 381; 18 Johns. 257, *Percival v. Hickey*.

And in every case, where the injury is the immediate effect of the defendant's act, and is stated in the declaration, or appears upon the trial, to have been wilfully done, the remedy must be trespass. 1 Chitty's Pl. 127; 8 D. & E. 188, *Ogle v. Barnes*; 6 D. & E. 128, and *Savinac v. Roome*, 6 D. & E. 125; 5 D. & E. 648, *Day v. Edwards*.

But where the damage or injury ensues, not directly from the act of the defendant, the remedy must be case. 1 Chitty's Pl. 126.

<sup>1</sup> Per Mr. Wedderburne in *Harker v. Birbeck*, 3 Burr. 1561. "Both actions may lie where there is both an immediate and also a consequential injury; and the plaintiffs therein, being entitled to both actions, must have their election to proceed in either."



In all cases, where the injury is attributable to negligence, although it were the immediate effect of the defendant's act, the party injured has an election, either to treat the negligence of the defendant as the cause of action, and declare in case, or to consider the act itself as the cause of the injury, and to declare in trespass. 1

Chitty's Pl. 127; 5 Bos. & Puller, 117, Rogers v. Imbleton; 3 Burrows, 1560; 5 B. & P. 447, note; 3 East, 600-601; 8 D. & E. 188, Ogle v. Barnes; 14 Johns. 432, Bliss v. Campbell, where it was decided that case might be maintained for wounding the plaintiff's leg, by negligently firing a pistol. 1 Bos. & Puller, 472, Turner v. Hawkins.

In the case now before us, it did not appear, that the injury was wilfully done, but it was the consequence of great carelessness. This is an instance, then, where either trespass or case may be maintained; and there must be judgment on the verdict.

## SECTION II.

### TROVER.

"Trover, in substance, is a remedy to recover the (value) of personal chattels wrongfully converted by another to his own use." It is an offshoot from trespass on the case.

Trover was so-called from the French "trouver," meaning "to find," and was founded on the fiction that the plaintiff had lost the chattels, and that the defendant had found them and then unlawfully converted them. The fiction of losing and finding was alleged in the declaration, but no issue could be joined upon it.

As finally developed, trover lies: 1. Without demand, for defendant's wrongful taking or destruction of personal chattels in plaintiff's actual or constructive possession. Bruen v. Roe, Sidf. 264; s. c. 3 Salk. 365. 2. After demand and refusal, for defendant's wrongful detention after his original rightful possession. Cooper v. Monks, Willes, 52; Mulgrave v. Ogden, Cro. Eliz. 219; Drew v. Spalding, 45 N. H. 472; Baldwin v. Cole, 6 Mod. 212.

Judgment, if for plaintiff, damages assessed by jury, and costs.

## THE HISTORY OF TROVER.

First, of the history of trover. We approach the modern action of trover by three distinct steps: 1. The ancient action for a *chose adirrée*. 2. The less ancient action of *detinue sur trover*. 3. The developed action of trover. Each of the three actions has its typical and peculiar feature; but it is significant to note at the outset that the essence of each action is a finding, and the individuality of the action is determined by some modification of that finding.

To be specific: in an action for a *chose adirrée*, the plaintiff finds his chattels in the defendant's possession; in an action of *detinue sur trover*, the plaintiff counts of a finding by the defendant of the plaintiff's lost chattels; and in the developed action of trover, the element of finding sinks into insignificance, except as form,<sup>1</sup> and the conversion stands out as the gist of the action, but there is still the fiction of losing and finding.

We shall trace the *chose adirrée* and the *detinue sur trover*, so far as we can, into the modern action of trover.

1. *Chose Adirrée*.COUNT FOR A CHOSE ADIRRÉE.<sup>2</sup>

Y. B. 21-22 EDWARD I. 466.

"Note<sup>3</sup> that where a thing belonging to a man is lost, he may count that he (the finder) tortiously detains it, etc., and tortiously for this that whereas he lost the said thing on such a day, etc., he (the loser) on such a day, etc., and found it in the house of such an one and told him, etc., and prayed him to restore the thing, but that he would not restore it, etc., to his damage, etc.; and if he will, etc. In this case the demandant must prove by his law (his own hand the twelfth) that he lost the thing."

<sup>1</sup> In *detinue upon trover*, it was repeatedly held that the trover was traversable. Y. B. 27 Hen. VIII. 33. "In *detinue* the plaintiff counted upon trover," and the defendant did not traverse the trover. Per Brian, J. "This is no plea without traversing the trover; for otherwise he does not encounter the plaintiff." Y. B. 21 Edw. IV. 55; Viner's Abr. *Detinue*, 37.

<sup>2</sup> Ames, History of Trover, 11 Harv. L. Rev. 374, at 382.

<sup>3</sup> Note also that "it is the plaintiff who finds the chattel in the defendant's possession." Ames, History of Trover, 11 Harv. L. Rev. 374, at 382.

CHOSE ADIRRÉE DEFINED.<sup>1</sup>

"We have now to consider the extension of detinue to cases where there was no bailment. Legal proceedings for the recovery of chattels lost were taken, in the earliest reported cases, in the popular courts. The common case was doubtless that of an animal taken as an estray by the lord of a franchise. If the lord made due proclamation of the estray, and no one claimed it for a year and a day, the lord was entitled to it. But within the year and day, the loser might claim it, and if he produced a sufficient *secta*, or body of witnesses to swear to his ownership or loss of the animal, it was customary for the lord to give it up, upon the owner's paying him for its keep, and giving pledges to restore it in case of any claim for the same animal being made within the year and day. . . . If the lord, or other person in whose hands the estray or other lost chattel was found, refused to give it up to the claimant, the latter might count against the possessor for his *res adirata*, or *chose adirrée*, that is, his chattel gone from his hand without his consent; or he might bring an appeal of larceny. According to Bracton, the pursuer of a thief was allowed '*rem suam petere ut adiratam per testimonium proborum hominum et si consequi rem suam quamvis furatam.*' This statement of Bracton, taken by itself, would warrant the belief that the successful plaintiff in the action for a *chose adirrée* had judgment for the recovery of the chattel. This may have been the fact; but it is difficult to believe that such a judgment was given in the popular court. No intimation of such a judgment is to be found in any of the earlier cases. It seems probable that Bracton meant simply that the plaintiff might formally demand his chattel in court as *adiratum*, and, by the defendant's compliance with the demand, recover it. For, in the sentence immediately following, Bracton adds that if the defendant will not comply with his demand, — '*si . . . in hoc ei non obtemperaverit*' — the plaintiff may proceed further and charge him as a thief by an appeal of larceny. This change from the one action to the other is illustrated by a case of the year 1233, 2 Bract. Note Book, No. 829."

<sup>1</sup> Ames, History of Trover, 11 Harv. L. Rev. 379.

2. *Detinue sur Trover.*

## OF A LOST HORSE.

NOVE NARRATIONES, F. 65.

This shows you W. etc. that whereas he had a horse of such a color, worth so much, on such a day, in such a year at such a place, he lost this horse, and he went seeking it from place to place, and made inquiry for it in Monastery, fair and market place, but could learn nothing of his horse nor hear of it, until such a day, when he came and found his horse in the custody of W. of C., from which time until now it has been in the custody of this same W. in said town, and he (the loser) told him (the finder) how that he had lost his horse and thereupon produced sufficient evidence to prove the said horse to be his before the bailiffs and the people of the town, and requested that he (the finder) deliver it to him (the loser), and this he refused to do and still refuses, to the injury and damage of the said W. twenty shillings. And if he will surrender it, etc.

“There seems to be no evidence of an action of *chose adirrée* in the royal courts. Nor has any instance been found of an action in these courts of detinue by a loser against a finder prior to 1371. In that year a plaintiff brought detinue for an ass, alleging that it had strayed from him to the seigniorship of the defendant, and that he one month afterwards offered the defendant reasonable satisfaction (for the keep). Issue was joined upon the reasonableness of the tender. Detinue by a loser against a finder would probably have come into use much earlier but for the fact . . . that the loser might bring trespass against a finder who refused to restore the chattel on request. Indeed, in 1455, where a bailiff alleged simply his possession, and that the charters came to the defendant by finding, Prisot, C. J., while admitting that a bailor might have detinue against any possessor of goods lost by the bailee, expressed the opinion that where there was no bailment the loser should not bring detinue, but trespass, if, on demand, the finder refused to give up the goods. Littleton insisted that detinue would lie, and his view afterwards prevailed. It was in this case that Littleton, in an aside, said, ‘This declaration *per inventionem* is a new-found Halliday; for the ancient declaration and entry has always been that the charters *ad manus et possessionem devenuerunt* generally without showing how.’ Littleton was right on the point. But the new fashion persisted, and *detinue sur trover* came to be the common

mode of declaring wherever the plaintiff did not found the action upon a bailment to the defendant. In the first edition of 'Liber Intrationum' (1510), f. 22, there is a count alleging that the plaintiff was possessed of a box of charters; that he casually lost it, so that it came to the hands and possession of the defendant by finding, and that he refused to give it up on request. The close resemblance between this precedent and the earlier one from 'Novæ Narrationes' will have occurred to the learned reader. But there is one difference. In the count for a *chose adirrée* it is the plaintiff who finds the chattel in the defendant's possession. In *detinue sur trover* the finding alleged is by the defendant. And until we have further evidence that the action in the popular courts was for the recovery of the chattel and not for damages only, it seems reasonable to believe that *detinue sur trover* in the king's courts was not borrowed from the action of *chose adirrée*, but was developed independently out of *detinue* upon a general *devenerunt ad manus*. But whatever question there may be on this point, no one can doubt that *detinue sur trover* was the parent of the modern action of *trover*.

"Add to the precedent in 'Liber Intrationum' the single averment that the defendant converted the chattel to his own use, and we have the count in *trover*."<sup>1</sup>

REPORTED Y. B. 18 EDWARD IV. F. 23, PL. 5. ANNO 1479.

The earliest reported case in which a defendant was charged with converting to his own use the plaintiff's goods.<sup>2</sup>

In an action on the case the plaintiff declared that he bailed certain tankards of silver to the defendant to take good care of, and that the defendant broke them and converted them to his own use, etc. *Tremaile*. It seems that the action does not lie, for it appears he can have a writ of *detinue*, for the property is not changed, and although he can recover the things themselves, yet he may recover in damages for them, etc. *Choke*. It seems to me otherwise, and it would be against reason to require him to prosecute an action of *detinue*, and when he has sued, he cannot have the effect of his suit, therefore it is vain, for the nature of an action of *detinue* is the recovery of the thing itself in specie, or the value in damages, if it cannot be found, and here it appears to you that latterly he could never recover the thing itself. And also another action was sued here lately, and the plaintiff counted that he bailed

<sup>1</sup> Ames, *History of Trover*, 11 Harv. L. Rev. 374, at 381.    <sup>2</sup> *Ibid.* 374, at 384.

to the defendant certain cloths of gold, who made garments of them, by which it appeared to the court, that as he could not recover the thing itself, the action was maintained, etc. Catesby. It seems that he can choose to have the one or the other, as if I deliver twenty pounds (£20) to Catesby, to deliver to Pigot, he can choose to have a writ of account against Catesby or a writ of detinue. And also if you borrow of me my horse to ride to York and you ride beyond to Calbrught, I may have a writ of detinue, and recover the horse, and then I shall have an action on my case, and recover damages for the use of my horse beyond the agreement. And in like manner if I bail to you my clothes to keep for me, and you wear them, so that they are injured, I shall have an action of detinue, for in all these cases the property is not changed, and then he shall have an action on his case, and recover damage for the loss that he hath sustained by the wear of his clothes, so here he may choose the one or the other, etc. Brian. It seems that he hath an action of detinue in this case, and no other action, and as to what is said that he hath an action of debt or of account, I say that he shall have an action of account and no action of debt. Upon what shall his action of debt be founded? Upon a contract, not upon a buying nor upon a borrowing may he declare, so this action fails, as to the other claim I put to you this question, if I bail to you my tankard to keep for me and you break it in four pieces, and keep them in your chest, is the property changed or not? And it was said it was not, therefore it is clear that he shall have an action of detinue, if the property be in him, that he may recover the thing itself. And I have taken it for clear law that he shall never have an action on the case if he can recover the thing itself. And also the defendant in an action of detinue may wage his law, and by that act the plaintiff in this case shall be ousted, and so note by his opinion that he shall recover damages for the breaking or for the impairment of his clothes, except when he recover all in damage, as when the goods are wholly destroyed.

“Detinue upon trover, the defendant justified for distress of the same goods for rent arrear, judgment *si actio*, and did not answer to the trover, and good *per cur.* for it is not traversable; but in the case of 27 Hen. VIII. 33, Shelley said, that in some case trover is traversable, which Fitzherbert expressly denied. Br. Detinue de Biens, pl. 2, cites 27 Hen. VIII. 22.” Viner, Abr. Detinue, 37, pl. 62.

“In detinue the plaintiff counted upon trover, the defendant justified for pledges upon money lent, and per Brian this is no plea

without traversing the trover; for otherwise he does not encounter the plaintiff." Br. Detinue de Biens, pl. 42, cites 21 Edw. IV. 55.

"It was formerly customary [in the declaration in trover] to allege the possession in the plaintiff, the losing by him and the finding by the defendant, but the very earliest cases do not show that the allegation of losing and finding was ever [in trover] held material." McKelvey, Pleading, 43.

### 3. *Trover*.

FULLER *v.* SMITH.

IN THE KING'S BENCH. 1696.

REPORTED 3 SALKELD, 366.

In trover, the plaintiff declared of a finding by ten persons, and that nine of them converted the good; upon not guilty pleaded the plaintiff had a verdict and judgment in C. B., but upon a writ of error in B. R. the judgment was reversed, because the conversion is the gift of the action, for if a man finds goods, it is lawful for him to take them up.

## DEFINITION AND CHARACTERISTICS OF TROVER.

Having determined that the gist of the modern action of trover is the conversion, four groups of cases naturally suggest themselves. They answer the following questions: 1. What amounts to a conversion? 2. Who may maintain an action for conversion? (a) As to right of property. (b) As to right of possession. 3. With what actions is trover concurrent? 4. What damages are recoverable in trover?

COOPER AND ANOTHER *v.* CHITTY AND BLACKISTON.

IN THE KING'S BENCH. 1756.

REPORTED 1 BURROWS, 31.

The essence of trover.

This cause was twice argued: it came first before the court, on Monday, 9th June, 1755; and again, upon Tuesday the 16th instant.

It was an action of trover brought by the assignees of William Johns, a bankrupt, against the sheriffs of London, who had taken and sold the goods of Johns in execution under a *fiery facias* which had issued against Johns, at the suit of one William Godfrey.

On the trial, a special case was settled:

Which case states, that Johns was regularly declared a bankrupt, on the 8th of December, 1753. And as to the rest, the following times and facts were stated, viz.: That on the 5th of December, 1753, one Godfrey obtained judgment in the Common Pleas, against the said Johns, and on the same day (5th December, 1753), execution upon the said judgment was taken out against him by Godfrey, and the goods seized by the sheriffs, under it; that Johns committed the act of bankruptcy, 4th December, 1753, and on the 8th of the same December, a commission of bankruptcy was taken out against him; and on the very same day, the commissioners of bankruptcy executed an assignment; and afterwards, viz.: on the 28th December, a bill of sale of the goods was made by the sheriffs. The plaintiffs are the assignees under the commission; the defendants are the sheriffs of London, who seized the goods under the execution.

The point was, Whether the assignees under the commission of bankruptcy can maintain an action of trover against the sheriffs (who executed this process under a regular judgment and execution) for seizing the goods under a *fiery facias* issued and executed after the act of bankruptcy was committed, and selling them after the assignment was executed.

The counsel who argued for the plaintiffs, made two questions, viz.: 1st. Whose property the goods were, when seized by the sheriffs, by virtue of this *fiery facias*? 2dly. Whose property they were, when sold by the sheriffs?

And now (Tuesday, 23d November, 1756), Lord Mansfield delivered the opinion of the court, and said they were all agreed, as well his two brethren then present in court as his brother Wilmot (who was at present engaged in another place), in their opinion.

There are few facts essential to this case; and it lies in a narrow compass.

He then stated the case (which see 1 Burr. 31), and was very particular in specifying the dates of the several transactions.

The general question is, "Whether or no the action is maintainable by the assignees against the defendants, the sheriffs, who have taken and sold the goods."

It is an action of trover.

The bare defining the nature of this kind of action, and the grounds upon which a plaintiff is entitled to recover in it, will



go a great way towards the understanding, and consequently towards the solution of the question in this particular case.

In form, it is a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use.

The form supposes the defendant may have come lawfully by the possession of the goods.

This action lies, and has been brought in many cases, where, in truth, the defendant has got the possession lawfully.

Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten.

Hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action for having taken it.

This is an action of tort; and the whole tort consists in the wrongful conversion.

Two things are necessary to be proved, to entitle the plaintiff to recover in this kind of action: 1st. Property in the plaintiff; and 2dly, a wrongful conversion by the defendant. / 2

As to the first, it is admitted in the present case, that the property was in the plaintiffs, as on and from the 4th of December (which was before the seizure), by relation.

This relation the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed (for the old statutes consider him as a criminal): they make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt, after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy.

Dispositions by process of law are put upon the same foot with dispositions by the party: to be valid, they must be completed before the act of bankruptcy.

Till the making of 19 George II. c. 32, if the bankrupt had, *bona fide*, bought goods, or negotiated a bill of exchange, and thereupon, or otherwise, in the course of trade, paid money to a fair creditor after he himself had committed a secret act of bankruptcy, such *bona fide* creditor was liable to refund the money to the assignees, after a commission and assignment; and the payment, though really and *bona fide* made to the creditor, was avoided and defeated by the secret act of bankruptcy.

This is remedied by that act, in case no notice was had by the creditor (prior to his receiving the debt) "That his debtor was become a bankrupt, or was in insolvent circumstances."

Therefore as to the first point, it is most clear that the property was in the plaintiffs, as on and from the 4th of December, when the act of bankruptcy was committed; secondly, the only question then is, "Whether the defendants are guilty of a wrongful conversion?"

That the conversion itself was wrongful is manifest.

The sheriffs had no authority to sell the goods of the plaintiffs, but of William Johns only; they ought to have delivered these goods to the plaintiffs, the assignees. Upon the foundation of the legal right, the chancellor, even in a summary way, would have ordered them to be delivered to the assignees.

It is admitted, on the part of the defendants, that the innocent vendee of the goods so seized can have no title under the sale, but is liable to an action; and that Godfrey the plaintiff would have no title to the money arising from such sale, but if he received it would be liable to an action to refund.

If the thing be clearly wrong, the only question that remains is, "Whether the defendants are excusable, though the act of conversion be wrongful?"

Though the statutes concerning bankrupts rescind all contracts and executions not completed before the act of bankruptcy, and vest the property of the bankrupt in the assignees by relation, in order to an equal division of his estate among his creditors, yet they do not make men trespassers or criminal by relation, who have innocently received goods from him, or executed legal process, not knowing of an act of bankruptcy; that was not necessary and would have been unjust.

The injury complained of by this action, for which damages are to be recovered, is not the seizure, but the wrongful conversion.

The assignment was made upon the 8th of December; the sale, not till the 28th of December; the return, not till the octave of Saint Hilary (which is the 20th of January).

The sheriff acts at his peril, and is answerable for any mistake: infinite inconveniences would arise if it were not so.

At the time of the sale and return, it was more notorious "that these goods belonged to the plaintiffs" than it could probably have been in the case of any third person; because commissions of bankruptcy and the proceedings under them are public in the neighborhood, and indeed all over the kingdom.

This conversion is 20 days after the assignment.

The defendants have here made a direct false return: they have returned, "that they took the defendant's goods, etc.," whereas they were (at the time of the return) notoriously the goods of the as-

signees when they were taken. They certainly might, and ought to have returned *nulla bona*, which was the truth ; for the goods taken were, beyond all manner of doubt, the goods of the assignees, at the time when the sheriffs took them ; and the bankrupt could have no goods after the 4th of December, when he had committed an act of bankruptcy. They would have been justified by the truth of the fact, if they had made this return ; for the bankrupt neither had nor could have any goods of his own at that time. It is arguing in a circle to say, "That they could not return *nulla bona*, because they were obliged to sell ; and they were obliged to sell, because they could not return *nulla bona*."

The seizure is here out of the case ; for the point of this action turns upon the injurious conversion.

Therefore we are all of opinion that the plaintiff is entitled to recover in this action.

Therefore, *per cur.* unanimously. The action is maintainable in this case against the defendants, and there must be judgment for the plaintiffs.

Judgment for the plaintiffs.<sup>1</sup>

### MULGRAVE v. OGDEN.

IN THE QUEEN'S BENCH. 1591.

REPORTED 1 CRO. ELIZ. 219.

Action *sur trover* of twenty barrels of butter ; and counts that he *tam negligenter custodivit* that they became of little value. Upon this it was demurred, and held by all the Justices, that no action upon the case lieth in this case ; for no law compelleth him that finds a thing to keep it safely ; as if a man finds a garment, and suffers it to be moth-eaten ; or if one find a horse, and giveth it no sustenance ; but if a man find a thing and useth it, he is answerable, for it is conversion : so if he of purpose misuseth it ; as if one finds paper, and puts it into the water, etc., but for negligent keeping, no law punisheth him. *Et adjournatur.*

### ANONYMOUS.

REPORTED 3 SALKELD, 365.

8. Where the defendant comes to the possession by finding, in such case denial is a conversion ; but if he had the goods by delivery, there denial is no conversion, but evidence of a conversion ; now

<sup>1</sup> The arguments and part of the opinion are omitted.

in both those cases the defendant had a lawful possession (namely) either by finding or by delivery, and where the possession is lawful, the plaintiff must show a demand and a refusal, to make a conversion.

But if the possession was tortious, as if the defendant takes away the plaintiff's hat, there the very taking is a sufficient proof of the conversion.

### BALDWIN *v.* COLE.

AT NISI PRIUS. 1704.

REPORTED 6 MODERN, 212.

**Trover.** The case, upon evidence, was this :

A carpenter sent his servant to work for hire to the queen's yard ; and having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue until the queen's work was done. A demand and refusal was proved at one time, and a tender and refusal after.

Holt, Chief Justice. The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden ; for what is a conversion, but an assuming upon one's self the property and right of disposing another's goods, and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them ; for the taking and carrying away another man's goods is a conversion ; so if one comes into my close and take my horse and ride him, there it is a conversion ; and here if the plaintiff had received them upon the tender, notwithstanding the action would have lain upon the former conversion, and the having of the goods after would go only in mitigation of damages ; and he made no account of the pretended usage, but compared it to the doctrine among the army, that if a man came into the service, and brought his own horse, that the property thereof was immediately altered and vested in the queen ; which he had already condemned.

And here one of the particulars in the declaration being ill laid, the defendant was found not guilty as to that, and guilty as to the rest.

ARMORY *v.* DELAMIRIE.

IN THE KING'S BENCH. 1722.

REPORTED 1 STRANGE, 505.

The plaintiff being a chimney-sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:—

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action will lay against the master, who gives a credit to his apprentice, and is answerable for his neglect. *Jones v. Hart*, 2 Salk. 441, *cor.* Holt, C. J.; *Mead v. Hammond*, 1 Str. 105; *Grammor v. Nixon*, *ib.* 653.

3. As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him, and make the value of their best jewels the measure of their damages; which they accordingly did.

FOULDES *v.* WILLOUGHBY.

EXCHEQUER OF PLEAS. 1841.

REPORTED 8 MEESON AND WELSBY, 540.

In determining whether a given act is a conversion, the defendant's intent may be material.

Trover for divers, to wit, two horses. Plea, not guilty.

The cause was tried before Maule, J., at the last Spring Assizes for Liverpool, when it appeared that the defendant was the occupier or manager of a ferry by means of steamboats over the river Mersey,

from Birkenhead to Liverpool, and that on the 15th of October, 1840, the plaintiff had embarked on board the defendant's ferry-boat at Birkenhead, having with him two horses, for the carriage of which he had paid the usual fare. It was alleged that the plaintiff misconducted himself and behaved improperly after he came on board the steamboat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of an hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the steamboat, and was conveyed over the river to Liverpool. On the following day the plaintiff sent to the hotel for the horses, but the parties in whose possession they were refused to deliver them up. A message, however, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending for them and paying for their keep; and that if he did not send for them and pay for their keep, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold by auction. The defence set up at the trial was, that the plaintiff had misconducted himself and behaved improperly on board, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned Judge told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the steamboat, and he had refused to go without his horses; and that if they thought the conversion was proved, they might give the plaintiff damages for the full value of the horses. The jury found a verdict for the plaintiff with £40 damages, the value of the horses.

In Easter Term last, a rule was obtained calling upon the plaintiff to show cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of the damages: against which rule

W. H. Watson and Atherton now showed cause. The evidence showed that which clearly amounted to a conversion, and it was not affected by the circumstance that the plaintiff had the means afterwards, if he had chosen, of obtaining the horses again. A wrongful removal of a chattel, even for a few yards, amounts in

law to a conversion. [Lord Abinger, C. B. According to that argument every trespass is a conversion. If a man takes and rides another person's horse without his consent, however short a distance, it is in law a conversion.] Alderson, B. In that case there is a user of the horse. Lord Abinger, C. B. In this case the horses were turned out of the boat by the defendant because the owner refused to take them out, and not with any view to appropriate them to his own use, but to get rid of their owner. Alderson, B. If a man were to remove my carriage a few yards, and then leave it, would he be guilty of a conversion? In the notes to *Wilbraham v. Snow*, 2 Saund. 470, it is said, "Whenever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie, for one may qualify but not increase a tort;" citing *Cro. Eliz.* 824, *Bishop v. Montague*. [Lord Abinger, C. B. I cannot agree to that position, at least to the extent for which it is now used.<sup>1</sup>] In *Bac. Abr.*, Trover (A), it is said, "If the goods of J. S. have been taken by J. N. in such a tortious manner that an action of trespass would lie, an action of trover will likewise lie." So in *Rolle's Abr.* 4, "Action sur case" (L):—"If a man take my horse and ride him, and then re-deliver him to me, still I may have an action against him, for it is a conversion, and the re-delivery is no bar to the action, and only goes in mitigation of damages;" citing the Countess of Rutland's case. The mere exercise of dominion over a thing is, in law, a conversion of it. What is said by Buller, J., in *Syeds v. Hay*, 4 T. R. 264, is applicable to the present case: "If a person take my horse to ride, and leave him at an inn, that is a conversion; for though I may have the horse on sending for him, and paying for the keeping of him, yet it brings a charge on me." In *Mulgrave v. Ogden*, *Cro. Eliz.* 219, which was an action of trover for twenty barrels of butter, with counts that the defendant *tam negligenter custodivit*, that they became of little value, it was held upon demurrer, by all the justices, "that no action on the case lieth in this case, for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment and suffers it to be moth-eaten; or if one finds a horse and giveth it no sustenance; but if a man finds a thing and useth it, he is answerable, for it is a conversion: so if he of purpose misuseth it, as if one finds paper and puts it into the water, etc.; but for negligent keeping no law punisheth him." And in *Buller's Nisi Prius*, 44, it is said, "To determine

<sup>1</sup> In the case cited, the beasts were taken absolutely by the defendant's bailiff as for a heriot due, the defendant afterwards agreeing to the taking and converting them. The court differed in opinion whether trover was maintainable, or whether the action should not have been trespass.

what evidence will be sufficient to prove a conversion in the defendant, it must be known how the goods came to his hands; for if they came to his hands by delivery, finding, or bailment, an actual demand and refusal ought to be proved; but it is not necessary to prove an actual demand, if an actual taking be proved, for the taking, being unlawful, is itself a conversion." They also referred to the cases collected in *Roscoe on Ev.*, 5th ed. 526.

As to the amount of damages, that was a question for the jury, and if they were satisfied that the defendant was guilty of the conversion, they were fully warranted in giving the full value of the horses, which were, in fact, wholly lost to the plaintiff.

Crompton, in support of the rule.<sup>1</sup>

Lord Abinger, C. B. This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned Judge who tried the cause had referred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass and those circumstances which are requisite to establish a conversion, he would not have so directed the jury. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare asportavit is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned Judge was wrong in telling the jury that the simple fact of putting these horses on shore by the defendant amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and, on being put on shore, the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a

<sup>1</sup> Crompton's argument is omitted.



conversion? That would be a much more colorable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water, and finding neither the owner nor any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be, that those circumstances would amount to a conversion, I ask, at what period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued, that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be: if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all: but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. The case which has been cited from *Strange's Reports*, of *Bushell v. Miller*, seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the custom-house quay. The plaintiff placed goods belonging to a third party in such a manner that the defendant could not get to his chest without removing them, which he accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead, that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the court there said, that whatever ground there might be for an action of trespass, in not

putting the package back in its original place, there was none for trover, inasmuch as the object of the party in removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board of a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really would be no danger whatever in taking them? In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held, that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

With respect to the amount of damages, it was altogether a question for the jury. I am not at all prepared to say, that if the jury were satisfied that there had been a conversion in this case, they would be doing wrong in giving damages to the full value of the horses. I do not at all rest my judgment on that point, but put it aside entirely. If the judge had told the jury that there was evidence in the case from whence they might infer that a conversion of these horses had taken place at some time, it would have been different; but his telling them that the simple act of putting them on shore amounted to a conversion, I think, was a misdirection, on which the defendant is entitled to a new trial.

Alderson, B. I am of the same opinion.

Gurney, B. If it had been left to the jury, on the whole of the

evidence in this case, to say whether a conversion had taken place or not, I think there was abundant evidence from which they might have drawn an affirmative conclusion. But the Judge only left that question to them on one part of the evidence, namely, that of the defendant's taking these horses out of the boat, and putting them ashore; and I cannot agree to the position, that that act, standing alone, amounts to a conversion.

Rolfe, B. I quite concur with the rest of the court.<sup>1</sup>

Rule absolute.

### PYNE *v.* DOR.

IN THE KING'S BENCH. 1785.

REPORTED 1 TERM REPORTS, 55.

This came on in consequence of a motion made on a former day by Mingay for a rule to show cause why a nonsuit should not be entered.

Buller, J., read the following report [a part of which is here omitted]. This was an action of trover brought by the tenant in tail, expectant on the determination of an estate for life without impeachment of waste, for timber which grew upon, and had been severed from, the estate, and was in the possession of the defendant. . . .

Lord Mansfield, Ch. J. In the first place, this was an action of trover. An action of trover must be founded on the property of the plaintiff. But what property had he in this timber? None. A tenant for life, without impeachment of waste, has a right to the trees the moment they are cut down.<sup>2</sup>

### HUNTER *v.* WESTBROOK.

AT NISI PRIUS. 1827.

REPORTED 2 CARRINGTON AND PAYNE, 578.

May a thing taken from a child be laid to be the property of the parent?

Trover by the father of a youth about sixteen years of age (who had been apprenticed to the defendant, in the business of a chemist and druggist, and had left his master without his consent) to recover a watch, some printed books, and several articles of wearing apparel, which it was alleged the defendant refused to deliver up.

<sup>1</sup> The opinions of Alderson, B., and Rolfe, B., who both concurred, are omitted.

<sup>2</sup> [The rest of the opinion, "as to the distinction between waste and destruction," is omitted.]

On the cross-examination of the son, who was called as a witness in support of the plaintiff's case, he said, that the articles in question had been given to him by his father.

Abbott, C. J., upon this intimated to the plaintiff's counsel that he thought the plaintiff must be nonsuited.

Campbell, for the plaintiff, submitted that the son was not emancipated, and that the property must be considered as belonging to the father. It had been decided that, in an indictment, property in the situation of that sought to be recovered in this action, might be laid as the property of the father.

Abbott, C. J. I am of opinion that the action is not maintainable. I believe it has been held that things stolen from a child may be laid to be the property of the parent, but I think that has been in the case of very young children. There must be a right of possession to maintain trover, which right this plaintiff has not. I am clearly of opinion that the plaintiff cannot recover.

Nonsuit.

Campbell, for the plaintiff, requested leave to move to enter a verdict for a shilling damages.

Abbott, C. J., inquired if there was any other defence.

Denman, C. S., replied in the affirmative.

His Lordship then said that he could not give the leave requested.

Campbell, and R. V. Richards, for the plaintiff.

Denman, C. S., and Payne, for the defendant.

### BETTS AND CHURCH v. LEE.

SUPREME COURT OF NEW YORK. 1810.

REPORTED 5 JOHNSON, 348.

On *certiorari*, from a justice's court. Lee sued the plaintiffs in error, in the court below, for a trespass, in taking and carrying away a quantity of shingles, and stuff for making shingles. Lee had cut down the timber of which the shingles were made, on land belonging to Robert L. Bowne. An action of trespass was brought by Bowne against Lee, for cutting down the trees; and the attorney of Bowne discontinued the suit, on the defendant's paying \$30. It was proved that the attorney, who settled the suit in behalf of Bowne, had said that in compromising several suits, for this and other trespasses of the same kind, he had charged as much to those who had not carried off the timber cut down, as to those who had carried away what they had cut; and that those who had not

taken off the timber cut down would have as much right to carry it away as those who had done so before the settlement of the suits.

The land on which the timber was cut down, and the shingles made, was conveyed by Bowne to the plaintiffs in error; and at the time of executing the deed a power of attorney from Bowne to the plaintiffs in error was also executed, authorizing them to sue all persons, in the name of Bowne, for trespasses, before that time committed, in cutting timber on the land. It was proved that the deed and power of attorney were executed prior to the suit brought by Bowne, and settled in the manner above stated.

The plaintiffs in error, as owners of the land, claimed the timber cut down, and prepared for making shingles, as well as the shingles not taken away by Lee, prior to the said suit, and prohibited him from taking them, and converted them to their own use. The jury found a verdict for Lee, the plaintiff below, for \$25, on which the justice gave judgment.

The question was, Whose property were the shingles and timber cut down after the settlement of the suit brought by Bowne against Lee for cutting down the trees?<sup>1</sup>

*Per curiam.* The evidence detailed in the return to the *certiorari* does not prove that when the suit for a trespass, brought by Bowne against Lee, was compromised, the attorney of Bowne, or the present plaintiffs, sold the shingles, etc., to Lee, or permitted him to take them. The \$30 paid by Lee to the attorney was for the damage of the trespass he had committed in cutting down the trees. A loose and equivocal observation, made at another time to a stranger, was not sufficient evidence to establish such a sale or consent. The settling of the suit for the trespass and recovering a compensation did not, *per se*, transfer to the trespasser a right to the timber cut down and remaining on the land; nor did the working one part into shingles, and the other part into short logs, change the title to the property.

The civil law required the thing to be changed into a different species, and to be incapable of being restored to its ancient form, as grapes made into wine, before the original proprietor could lose his title; nor even then did the other party acquire any title by the accession, unless the materials had been taken away, in ignorance

<sup>1</sup> As to the right of one co-tenant of a chattel to convert it to its usual and profitable use without being liable in trover to the other co-tenants, see *Fennings v. Lord Grenville*, 1 Taunton, 241; where A. and B. were co-tenants of a whale, and A. refused to deliver half of the whale to B., but cut it up and tried out the oil. As to co-tenants of realty, see *Matts v. Hawkins*, 5 Taunton, 20; *Cubitt v. Porter*, 8 B. and C. 257; 1 Chitty, 89.

of their being the property of another. (Vinnius, Inst. lib. 2, tit. 1, § 25; Dig. 10, 4, 12, 3.) The civil law, in its usual wisdom, gave no encouragement to trespassers.

But this very point has been decided against the trespasser, by the English common law. It is laid down in the Year Books, after solemn argument on demurrer, that whatever alteration of form any property has undergone, the owner may seize it, in its new shape, if he can prove the identity of the original materials; as if leather be made into shoes, or cloth into a coat; or a tree to be squared into timber. (5 Hen. VII. 15; 12 Hen. VIII. 10; Fitz. Abr. Bar. 144; Bro. tit. Property, 23.) We are of opinion, therefore, that the judgment below ought to be reversed.

Judgment reversed.

### GORDON v. HARPER.

IN THE KING'S BENCH. 1796. ✓

REPORTED 7 TERM REPORTS, 9.

To maintain trover, the plaintiff must have both rights of property and possession.

In trover for certain goods, being household furniture, a verdict was found for the plaintiff, subject to the opinion of this court on the following case: On the 1st October, 1795, and from thence until the seizing of the goods by the defendants as after mentioned, Mr. Biscoe was in possession of a mansion-house at Shoreham and of the goods in question, being the furniture of the said house, as tenant of the house and furniture, to the plaintiff, under an agreement made between the plaintiff and Mr. Biscoe, for a term which at the trial of this action was not expired. The goods in question were on the 24th of October taken in execution by the defendant, then sheriff of the county of Kent, by virtue of a writ of *testatum fieri facias* issued on a judgment at the suit of J. Broomhead and others, executors of J. Broomhead deceased, against one Borrett, to whom the goods in question had belonged, but which goods, previous to the agreement between the plaintiff and Mr. Biscoe, had been sold by Borrett to the plaintiff. The defendant after the seizure sold the goods. The question is, whether the plaintiff is entitled to recover in an action of trover.

Burrough for the plaintiff admitted that the action of trover is founded in the plaintiff's right of property in the goods to be recovered, and that though an actual possession by him before the conversion was not necessary, yet that he must also have the right

of possession at the time of the action brought. But he contended that in this case the plaintiff had the legal possession. The intent of the parties to the agreement was no more than that the tenant should have the use of the furniture during the term; the ownership and property remained in the landlord, the plaintiff. If the tenant had injured or destroyed it, the plaintiff might have maintained trespass; according to the case put in Co. Lit. 57 *a*, that if a man lend his sheep to another to dung his land, and he kill them, trespass lies notwithstanding the delivery. So here as the tenant had only the use and not the property of the goods, as soon as they were put in that state wherein he could no longer enjoy the use of them in the manner agreed upon, the full dominion of the plaintiff revived. In the same manner during a lease of lands, the tenant has a right to the use of the trees growing thereon for every purpose except that of cutting them down; but as soon as they are cut down, although by a stranger, his interest ceases, and the possession as well as property in the timber vest in the owner of the inheritance. Even in the case of an execution against the tenant, the sheriff could not seize and sell furniture let with the premises, because the writ of execution only authorizes him to sell the goods of the tenant; which shows that in law he is only considered as entitled to the use, and has not the property in them; and he cited Plow. 524. But the case of *Ward v. Macauley*, 4 Term Rep. 489, is directly in point; there the landlord of a ready-furnished house brought trespass against the sheriff for seizing the furniture under an execution against the tenant: the court held the action misconceived; and Lord Kenyon said that the remedy was by an action of trover; and he took the distinction between trespass and trover, the former of which was founded upon possession, the latter on property. Here the right of property always remained in the plaintiff, and as soon as the temporary and qualified use which he had given to another was determined, which was the case when the goods could no longer be enjoyed in the stipulated manner, he had a right to resume the actual possession of them from the hands of the wrong-doer.

Best, *contra*, was stopped by the court.

Lord Kenyon, Ch. J. I forbear to deliver any opinion as to what remedy the landlord has in this case, not being at present called upon so to do: but it is clear that he cannot maintain trover.

Ashhurst, J. I have always understood the rule of law to be, that in order to maintain trover the plaintiff must have a right of property in the thing; and a right of possession, and that unless both these rights concur, the action will not lie. Now here it is

admitted that the tenant had the right of possession during the continuance of his term, and consequently one of the requisites is wanting to the landlord's right of action. It is true that in the present case it is not very probable that the furniture can be of any use to any other than the actual tenant of the premises: but supposing the things leased had been manufacturing engines, there is no reason why a creditor seizing them under an execution should not avail himself of the beneficial use of them during the term.

Grose, J. The only question is whether trover will lie where the plaintiff had neither the actual possession of the goods taken at the time, nor the right of possession. The common form of pleading in such an action is decisive against him; for he declares that being possessed, etc., he lost the goods; he is therefore bound to show either an actual or a virtual possession. If he had a right to the possession, it is implied by law. Where goods are delivered to a carrier, the owner has still a right of possession as against a tortfeasor, and the carrier is no more than his servant. But here it is clear that the plaintiff had no right of possession; and he would be a trespasser if he took the goods from the tenant; then by what authority can he recover them from any other person during the term? It is laid down in some of the books that trover lies where detinue will lie, the former having in modern times been substituted for the old action of detinue. I will not say that it is universally true that the one action may be substituted for the other, because the authorities referred to in support of that proposition do not apply to that extent: but certainly it may be said to be a good general criterion. . . . It appears now very clearly upon examining that point that trover will not lie in any case unless the property converted was in the actual or implied rightful possession of the plaintiff. In this case the plaintiff had neither the one nor the other pending the demise, and when that is determined, perhaps he may have his goods restored to him again in the same state in which they now are, when it will appear that he has not sustained that damage which he now seeks to recover in this action.

Lawrence, J., concurred.

*Postea* to the defendant.<sup>1</sup>

<sup>1</sup> The opinion of Lawrence, J., and parts of the opinions of Lord Kenyon, C. J., and Grose, J., are omitted.



BISHOP v. MONTAGUE.IN THE COMMON PLEAS. 1644. ✓REPORTED 2 CROKE'S ELIZABETH, 824.Either trover or trespass will lie for goods taken by wrong.

Action sur trover, and conversion of five oxen. The defendant pleaded not guilty. By special verdict it was found that one J. S., as bailiff to the defendant, took those beasts, as for heriots due to the defendant, where there were not any due, and without any command from the said Viscountess Montague; but that afterwards she agreed thereto, and converted them; and after that the bailiff died; and, Whether this action lies, or that he should have brought a general action of trespass? was the question.

Walmsley and Kingsmil held, that this action lies not; for when the bailiff took them tortiously, the property and the possession is divested out of the plaintiff, so that he cannot suppose that he was possessed of them until he lost them, and until they came to the defendant's hands; and the defendant, by assenting to the taking, is a trespasser *ab initio*; as 38 Assize, 9; 38 Edw. III. pl. 18, and 40 Edw. III. pl. 20, are. Therefore, where he might have had a general writ of trespass, he cannot have any other manner of action; especially not this action, which differs from it in nature and quality.

Anderson and Warberton, *è contra*. They agreed, that an assent before or after the taking of the goods made her trespasser *ab initio*, and to be punished as a trespasser; but not an assent after to a battery formerly done; or to that which is a tort, and punishable by the statute law; as an assent to a riot or forcible entry, after it be done, shall not make him punishable. But although trespass lies, yet he may have this action if he will, for he hath his election to bring either. And as he may have detinue or replevin for goods taken by a trespass, which affirms always property in him at his election, so he may have this action; for one may qualify a tort, but not increase a tort. So he hath election to make it a tortious prisal or not: which is the reason, that if goods be taken by a trespasser, yet if the party from whom they were taken be attainted of felony, he shall forfeit them; for the right and property remains in him, and the law shall adjudge them in him, until he makes his election to the contrary, by bringing a writ of trespass. Wherefore here he might maintain the one writ or other, at his election. Wherefore, etc.

## SECTION III.

## ASSUMPSIT.

## THE ACTIONS OF DEBT AND ASSUMPSIT COMPARED.

1. *The Genealogy and Characteristics of Debt and Assumpsit.*

There are certain fundamental distinctions between debt and assumpsit. In its origin, debt was proprietary, originally descending, as we have seen, from an ancient writ of right for services due by virtue of contract of tenure, which was followed by a writ of right for money due by virtue of contract of tenure, which was followed by a writ for money loaned, from which the formed writ of debt descends. The writ of right was a real action, and strictly proprietary. It lay to restore to the demandant certain land of which he had the title in fee simple. The writ of debt lay to restore to the plaintiff a certain sum of money of which he had the title; and that, too, not by virtue of any contract, but simply as a matter of proprietary right. A., who had sold his ox to B. for £10, got title to £10 in B's. pocket at the instant when A. delivered the ox to B. and B. got title to it. A. would not say to B. when he sued B. in a writ of debt, "Pay me the £10 you promised me;" he would exclaim, "Restore to me the £10 of which you deforce me, for it is mine."

Assumpsit, unlike debt, was not in its origin proprietary, descended from the highest form of writ to recover the highest property known to the law. It was a bastard action, an offspring of the personal writ of trespass on the case, and was anciently known as trespass on the case upon promises. Its foundation is an assumpsit, an undertaking, a promise.

A. sold his ox to B. for as much as it was worth, which B. promised to pay; or for £10, which B. promised to pay. A. sued B. in assumpsit. A. would not say to B., "Give me my ox's value; it is mine;" or, "Give me my £10, because the money is mine; I have the title to the very coins in your pocket that make the sum": he

would declare upon a promise, and the foundation of his action would be that promise, coupled with an allegation that B. intended to deceive him; for just as in the modern action of debt there remain traces of its real property ancestor, so in the modern action of assumpsit there lingered not so very long ago the characteristics of its parent action, trespass on the case for the deceitful breach of a promise.

We have noted more. We have seen that debt never lay except for a sum certain, but that assumpsit lay to recover damages for the breach of an unliquidated simple contract; that debt lay on specialties, simple contracts, statutes, and records, while assumpsit never lay on specialties; and that debt could be defeated by a peculiar trial called wager of law, which did not prevail in assumpsit.

But we now come to notice a branch of assumpsit that bears a most striking resemblance to debt. That branch is *indebitatus assumpsit*.

#### DEBT AND INDEBITATUS ASSUMPSIT.

In Hard's case, 1 Salk. 23, it is said, "*Indebitatus assumpsit* will lie in no case but where debt lies." In Walker v. Walker, Holt, 328, per Holt, C. J., "This is merely a wager, and no *indebitatus assumpsit* lies for it; for to make that lie, there must be a work done, or some meritorious claim for which debt lieth." See Parol Contracts Prior to Assumpsit, Ames, 8 Harv. L. Rev. 262. In Bovey v. Castleman, 1 Ld. Ray. 69, it is said, "For mutual promises assumpsit may lie, but not *indebitatus assumpsit*." Here, then, are words which enable us to draw a sharp line between debt and *indebitatus assumpsit* on the one hand, and assumpsit, apart from *indebitatus assumpsit*, on the other.

Debt. <i>Indebitatus as-</i>		Assumpsit, apart from <i>in-</i>
<i>sumpsit</i> .		<i>debitatus assumpsit</i> .

For the moment, then, let us compare debt with assumpsit, apart from the *indebitatus* count. Striking as the dis-

tinctions already noted are, if we go back far enough we find a distinction that is fully as interesting as any that we have yet stated.

The characteristic consideration of *assumpsit*, which we shall here investigate, was in the form of detriment to the promisee, while that of debt took the form of gain to the promisor. The distinction between gain to the promisor and detriment to the promisee may be made clear by two simple examples. A. said to B., a doctor, "I am sick; cure me, and I will pay you £10." B. effected a cure. Clearly there was a gain to A., the promisor. Again, A. said to B., a doctor, "Go, nourish yonder stranger with your physics, and make him well, and I will give you £10." B. thus made the stranger well. A. received no worldly gain. But B. had parted with time, trouble, and medicine; he had suffered a detriment. B. sought against A. an action of debt. Anciently, were we to have consulted the precedents, we should have had to deny B. his writ.

Thus in *Y. B. 9 Hen. V. p. 14, pl. 23*, A. had a claim for £10 against T. A. released this claim upon B.'s promise to pay him the full amount. B. did not pay. A. brought a writ of debt against B. Coke said, "To my mind the matter is not sufficient. *Quære*, Out of nothing [*nudo pacto*] no action arises." And this was the opinion of the court. The plaintiff failed because the benefit of the release was received by T. *Parol Contracts Prior to Assumpsit*, Ames, 8 Harv. L. Rev. 262.

Here, then, is a sharp difference between debt, on the one side, and *assumpsit*, apart from *indebitatus assumpsit*, on the other.

But later, we find that this distinction in part breaks down. In *Y. B. 37 Hen. VI. p. 9, pl. 18*, Moyle, J., said, "If I say to a surgeon that if he will go to one J., who is ill, and give him medicine and make him safe and sound, he shall have 100 shillings, now if the surgeon gives J. the medicines and makes him safe and sound, he shall have a good action [debt] against me for the 100s., and still the thing is to another and not to the defendant himself, and so he has not

*quid pro quo*, but the same in effect." Parol Contracts Prior to Assumpsit, Ames, 8 Harv. L. Rev. 262.

This reasoning of Moyle, J., met with general favor, and it became a settled rule that whatever would constitute a *quid pro quo*, if rendered to the defendant himself, would be none the less a *quid pro quo*, though furnished to a third person, provided that it was furnished at the defendant's request, and the third person incurred no liability therefor to the plaintiff. Thus a father is liable for physic provided for his daughter, *Stonehouse v. Bodvil*, T. Ray. 67; 1 Keb. 439, s. c.: a mother for board furnished to her son, *Bret v. J. S.*, Cro. El. 756; and a mother was charged in debt by a tailor for embroidering a gown for her daughter's maid; *Shandois v. Stinson*, Cro. El. 880.

We said above that these cases are illustrations of where the distinction between the kinds of consideration necessary to support debt and assumpsit in part breaks down. But let us observe that all these seem to be cases where the person benefited was not himself liable to the plaintiff for the benefit received. Thus, where physic was furnished to A.'s daughter, and A. held liable for it, only A., the father, was liable in debt. The daughter was not. For "there cannot be a double debt upon a single loan." *Per curiam*, *Marriott v. Lister*, 2 Wils. 141, 142.

And we may lay down the rule that "It is an indispensable condition of the defendant's liability in debt in cases where another person received the actual benefit, that this other person should not himself be liable to the plaintiff for the benefit received." Parol Contracts Prior to Assumpsit, Ames, 8 Harv. L. Rev. 263.

All this may seem at first blush a recapitulation of the cases bearing on the point already presented under the head of "Debt." But it is more. It is an introduction to the action of assumpsit, and marks a rough boundary line between that action and debt.

## THE HISTORY OF ASSUMPSIT.

## TRESPASS ON THE CASE AND ASSUMPSIT.

(a) *Early Necessity of alleging an Assumpsit in Actions for Misfeasance.*

1. Anciently, case lay for damages resulting from the defendant's conduct with reference to the plaintiff's person or property, even though there was no forcible contact: but there must have been an express undertaking on the defendant's part, improperly performed, to make him liable.

2. If, however, the nature of his occupation required him to act with reasonable skill, no express undertaking was necessary.

## (1) ANON.

REPORTED Y. B. 22 ASSIZES 94, PL. 41.

I. of B. makes complaint by bill that G. of F. on a certain day and year at B. on the Humber, had undertaken to carry his beast taken, etc., in his boat, over the waters of the Humber safe and sound, whereas did the said G. overload his boat with other horses, by which overloading the beast perished, to the injury and damage, etc.

Richm. [prayed] judgment of the bill [for that] it declares against us no wrong [tort] but proves that he should have action by writ by way of covenant, or by way of trespass. Wherefore, etc.

Bank. It appears that you did him a trespass when you overloaded the boat, by which his beast perished, etc. Wherefore, etc.

Richm. Of nothing guilty, *prest d'averrer nostre bill*, etc.

## (1) MOSLEY v. FOSSET.

REPORTED MOORE, 543, PL. 720. ANNO 1598.

An early necessity for an express undertaking in case of bailees.

Action on the case, and [the plaintiff] declares that the defendant took from the plaintiff a gelding to pasture for 2s. per week, and the defendant was to keep him safely, and redeliver him [to the plaintiff] when he should be required. And moreover, [he declares], that the defendant watched the horse so negligently

that it was taken by unknown persons. The defendant demurred. And the justices were divided, two on each side. Popham and Fenner, that the action does not lie without alleging a request for redelivery, and also alleging that the horse was stolen, dead, or lost. Gawdy and Clench, *à contra*, for that the action is founded on the negligence and special assumpsit to keep safely. But all agreed that without such special assumpsit the action would not lie.

### RICHES *v.* BRIGGS.

IN THE KING'S BENCH. 1602.

REPORTED YELVERTON 4 A.J. CRO. ELIZ. 883 S. C.

The bailee charged in an action on the case upon a gratuitous bailment.

In an action on the case, the plaintiff declared that in consideration he had delivered to the defendant twenty quarters of wheat, the defendant promised upon request to deliver the same wheat again to the plaintiff. And adjudged a good consideration;<sup>2</sup> for by Popham and *tot. cur.* the very possession of the wheat might be a credit and good countenance to the defendant to be esteemed a rich farmer in the country, as in case of the delivery of £1000 in money to deliver again upon request; for by having so much money in his possession he may be preferred in marriage. *Quære*, for it seems an hard judgment; for the defendant has not any manner of profit to receive, but only a bare possession.

*Nota*, The truth of the case was (which doth not alter the reason *supra*) that the plaintiff had delivered to the defendant the said twenty quarters of wheat to deliver over to J. S., to whom the plaintiff was indebted in so many quarters, and the defendant promised to deliver the same quarters of wheat to J. S.<sup>3</sup> And because they

<sup>1</sup> Metcalf's edition.

<sup>2</sup> Mr. Justice Metcalf in his note to the above case says, "The first reported case, in which it was holden that a consideration was necessary to support a promise, is *Watton v. Brinth*, 2 Hen. IV. 3 b. Defendant promised to repair certain houses of the plaintiff, and had neglected to do it. The plaintiff was nonsuited, because no consideration was stated for the promise. The next case was against a carpenter, stating that he had undertaken to build a house for the plaintiff, and had not built it. It was held to be *nudum pactum*, because no consideration was alleged. 11 Hen. IV. 33 a. The question whether an action would lie for a nonfeasance when there was no consideration was afterwards agitated in numerous cases, and the same principle uniformly recognized. 14 Hen. VI. 18 b; 19 Hen. VI. 49 a; 20 Hen. VI. 34 a; 2 Hen. VII. 11; 21 Hen. VII. 41; *Stath. Abr. Accions sur le cas*, pl. 20; *Finch, Descrip. of Com. Law*, 159; *Dr. & Stud.* 177; *Keilw.* 78; 1 *Pow. Con.* 330; 5 *D. & E.* 143; *Elsee v. Gatward*." The learned judge's error is apparent if we read *Watton v. Brinth*.

<sup>3</sup> "And [this] was so stated in the declaration, according to Croke's report of the case; see *Cro. Eliz.* 883;" note of Mr. Justice Metcalf.

were not delivered, the plaintiff brought his action *ut supra*; and adjudged *ut supra*. But *nota*, the judgment was reversed in the Exchequer,<sup>1</sup> Mich. 44 and 45 Eliz., as Hitcham told Yelverton.

# (1) WHEATLEY v. LOW.

IN THE KING'S BENCH. 1623.

REPORTED CROKE'S JAMES, 668.

The first case which decided that a bailee might be charged in assumpsit on a gratuitous bailment.

Action on the case. Whereas he was obliged to J. S. in £40 for the payment of £20; and the bond being forfeited, he delivered £10 to the defendant, to the intent he should pay it to J. S. in part of payment *sine ulla morâ*; that in *consideratione inde* the defendant assumed, etc., and assigns for breach, that he had not paid; whereupon the other had sued him for this debt, etc.

The defendant pleaded *non assumpsit*; and verdict for the plaintiff. It was moved in arrest of judgment, that this is not any consideration, because it is not alleged, that he delivered it to the defendant upon his request; and the acceptance of it to deliver to another *sine morâ* cannot be any benefit to the defendant to charge him with this promise.

*Sed non allocatur*; for, being that he accepted this money to deliver, and promised to deliver it, it is a good consideration to charge him. Wherefore it was adjudged for the plaintiff. A writ of error being brought, and this matter only assigned in error, the judgment was affirmed.

REPORTED Y. B. 19 HEN. VI. 49, PL. 5. ANNO 1441.

## [Extract.]

(2) [Y., a surgeon, undertook to cure X's horse, but treated it so negligently that it died.] *Per* Paston, J. "You have not shown that he is a common surgeon to cure such horses, and so, although he killed your horse by his medicines, you shall have no action against him without an assumpsit."

<sup>1</sup> "This reversal was erroneous. The decision in the King's Bench was subsequently recognized, and conforms to the present established doctrine. Cro. Jac. 668; Wheatly v. Low, Palm. 281; s. c. Winch, 25; Vanheath v. Turner, per Hobart, C. J.; 2 Ld. Raym. 920, Coggs v. Bernard; Jones on Bailments, 71; 1 Selw. N. P. 40, n.; 2 Bay, 551, Bolan v. Williamson *et al.*:" note by Mr. Justice Metcalf.



## DECEIT AND ASSUMPSIT.

(b) *Early Necessity for alleging an Undertaking in Actions on False Warranties.*

3. Later, case for deceit was allowed against the vendor of a chattel who warranted it falsely.

("The words *super se assumpsit* were not used, it is true, in a count upon a warranty; but the notion of undertaking was equally well conveyed by '*warrentizando vendidit*.'" History of Assumpsit, Ames, 2 Harv. L. Rev. 8.)

4. Case for deceit lay also against those who, like taverners or vintners, were bound by the nature of their occupation to sell articles of a certain quality.

(3) CHANDELOR *v.* LOPUS.

IN THE EXCHEQUER CHAMBER. 1603.

REPORTED CROKE'S JAMES, 4.

Warranty distinguished from bare affirmation.

Action upon the case. Whereas the defendant, being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezar-stone, and sold it to him for £100; *ubi revera* it was not a bezar-stone: the defendant pleaded not guilty, and verdict was given and judgment entered for the plaintiff in the King's Bench.

But error was thereof brought in the Exchequer Chamber, because the declaration contains matter not sufficient to charge the defendant, viz. that he warranted it to be a bezar-stone, or that he knew that it was not a bezar-stone; for it may be he himself was ignorant whether it were a bezar-stone or not.

And all the justices and barons (except Anderson) held, that for this cause it was error: for the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action: and although he knew it to be no bezar-stone, it is not material; for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action, and the warranty ought to be made at the same time of the sale; as F. N. B. 94 c, and 98 b; 5 Hen. VII. pl. 41; 9 Hen. VI. pl. 53; 12 Hen. IV. pl. 1; 42 Ass. 8; 7 Hen.

IV. pl. 15. Wherefore forasmuch as no warranty is alleged, they held the declaration to be ill.

Anderson to the contrary for the deceit in selling it for a bezar, whereas it was not so, is cause of action. But notwithstanding it was adjudged to be no cause, and the judgment was reversed.

#### (4) ROSWELL *v.* VAUGHAN.

IN THE EXCHEQUER CHAMBER. 1607.

REPORTED CROKE'S JAMES, 196.

Actions of deceit for false warranties of title considered.

Action on the case in the nature of deceit. Whereas on the 9th of June, 35 Eliz., Queen Elizabeth was seized in fee of the advowson of the vicarage of Southstoke, whereto the tithes in Southstoke appertained; to which vicarage the defendant on the 9th of June, 35 Eliz., affirmed that he was lawful incumbent, and had a right to the tithes from the death of Thomas Vaughan the incumbent; whereupon the plaintiff, 16 June, 35 Eliz., having communication with the defendant about his buying of the defendant the tithes appertaining to the said vicarage, after the death of the said Thomas Vaughan (who died 16 April, 35 Eliz.), until Michaelmas following; that the defendant, *ad tunc sciens* that he had not any right or interest to the tithes, whereas he was never instituted and inducted, but that they appertained to Evan Thomas, sold them to the plaintiff for £30, *falso et deceptivè*, and allegeth *in facto*, that Evan Thomas was presented, admitted, instituted, and inducted to that vicarage on the last day of August, 35 Eliz., and took the tithes and so the plaintiff lost them.

The defendant pleads not guilty; and found against him. And it was now moved in arrest of judgment that the action lay not; for an action in the nature of deceit lies not where one sells a thing which he hath not property in; and although he took upon him in discourse that he was owner, and had right to sell, unless he warrants that the other should enjoy it accordingly (which warranty ought to be at the time of the sale), it is not good; but here is not any warranty nor affirmance at the time of the sale, that he had any right or title to sell; for his affirmance that he was vicar, and had right to sell, was upon the 9th of June, and the sale was the 16th of June, after; and in proof hereof he relied upon 5 Hen. VII. pl. 41, 9 Hen. VII. pl. 21, and Chandelor *v.* Lopus, Cro. Jac. 4.

Tanfield, Chief Baron, and Altham, were of that opinion. But if a man sell victuals which are corrupt, without warranty, an action

lies, because it is against the Commonwealth; as 9 Hen. VI. pl. 53, 7 Hen. IV. pl. 15, and 11 Edw. IV. pl. 6. And although the Book of Assize, 42 Ass. pl. 8, was objected, when one took goods from another and sold them, and the owner retook them, that an action upon the case was brought in the nature of deceit for this falsity in sale without any warranty. Tanfield thereto answered, that the said book is not adjudged, but the party admits it, and takes issue; yet if it were allowed to be law, it is because he there had possession by tort, and so had color in show to be owner; and he was deceived by buying of him who had only gained a tortious possession; and although he had not any right, yet every one took cognizance of him as owner, and he himself knew that he was not right owner; which is the reason that the action was maintainable: but here he had not any possession; and it is no more than if one should sell lands wherein another is in possession, or a horse whereof another is possessed, without covenant or warranty for the enjoyment, it is at the peril of him who buys, and not reason that he should have an action by the law, where he did not provide for himself. Wherefore it was adjudged for the defendant.<sup>1</sup>

### BURNBY *v.* BOLLETT.

EXCHEQUER OF PLEAS. 1847.

REPORTED 16 MEESON & WELSBY, 644.

The law implies a warranty from the very occupations of the vendors of certain chattels.

Case. The declaration stated, that the defendant, on, etc., at Lincoln, publicly offered for sale the carcass of a pig for the food of man, and thereby then and there falsely and fraudulently undertook and warranted that the said carcass was in a sound and wholesome condition, and fit for human consumption, whereby the plaintiff was induced to buy the said carcass at the sum of £6 18s. 6d., whereas, in truth and in fact, the said carcass was not in a sound and wholesome condition, and fit for human consumption, but, on the contrary thereof, was unsound, unwholesome, etc., whereby, etc.

**Plea, not guilty.**

**At the trial,** before Patteson, J., at the last summer assizes for Lincolnshire, it appeared that the plaintiff and the defendant were farmers. The defendant had bought the carcass of the pig in ques-

<sup>1</sup> "To-day a warranty of title is commonly implied from the mere fact of selling." Ames, *History of Assumpsit*, 2 Harv. L. Rev. 10; *Eicholtz v. Bannister*, 17 C. B. N. S. 708.

tion at the stall of one Penrose, a butcher, in the public shambles in Lincoln market; but, having other business in the town, left it hanging up at the seller's stall, till it was more convenient to take it away with him. Before he returned, the plaintiff came to the same stall, and seeing the pig, offered to buy it. The stall-keeper told him that it was the property of the defendant, who had bought it, but added that he might perhaps part with his bargain for a small profit. The plaintiff then went to seek out the defendant, and having met with him in the market, dealt with him for the pig, and bought it of him. It was forthwith conveyed to the plaintiff's house. Next day the meat was found to be diseased and quite rotten, so as to be wholly unfit for human food.<sup>1</sup> Thereupon the plaintiff brought this action to recover back the purchase-money, by way of damages for the breach of an implied warranty of soundness. The defence was, *caveat emptor*. Upon these facts, Patteson, J., inclined to think that the law implied such a warranty on the part of the defendant as was alleged in the declaration, and directed the jury accordingly. Verdict for the plaintiff for £6 18s. 6d., subject to a motion to enter a nonsuit. A rule *nisi* having been afterwards obtained accordingly,

Humfrey and J. Hildyard showed cause at the sittings after Hilary Term. The plaintiff was entitled to bring this action; for, on a sale of meat for the use of man, a warranty of soundness and fitness for human consumption is implied by law. [Parke, B. The jury have negatived fraud. The question then is, whether any and every man who sells provisions in a market must be taken to sell them with an implied warranty of soundness.] It was immaterial whether the defendant knew it was unsound and unwholesome meat or not, and it is a public and indictable offence, for which he may be punished. [Alderson, B. The defendant sold a pig which had been exposed for sale, not by him, but by one Penrose. Parke, B. The authority in *Keilway*, 91, may authorize an action against Penrose. Alderson, B. There is no evidence that the defendant's suffering the meat to be in the place where the plaintiff saw it was with the object of selling it. Nor is it found that he bought it for sale. Parke, B. Here was no public exposure for sale, except by Penrose. The defendant was not a dealer in meat. There was no express warranty, and no fraud. The plaintiff has to make out that a naked sale of an article which is to be eaten, and proves unfit for it, is actionable.] Still the law implies a warranty; for, however the defendant became possessed of it, as he afterwards

<sup>1</sup> It was sworn that, throughout the neighborhood, the season had proved unaccountably injurious to meat.

sold it, he was bound, before so selling it, to ascertain that it was fit for food. That is founded on the necessity of preventing injury to the public. In Keilway's Rep. 91 (22 Hen. VII.),<sup>1</sup> Frowicke said, that "no man can justify selling corrupt victual, but an action on the case lies against the seller, whether the victual was warranted to be good or not. But if a man sells me cloth or other thing, knowing the cloth to be bad, there I am deceived '*per son notice demesne*;' and in that case, because '*quod ipse fuit sciens*,' though he sold it without warranty, still he shall be punished by writ on the case. But if he did not know it, he shall not be punished, unless he has warranted the article to be good." The case then proceeds to allude to the Year Book, 9 Hen. VI. 53,<sup>2</sup> in which case Babington (apparently a judge) said, that warranty of soundness by a seller of provisions was unnecessary, adding that, if a man goes into a tavern for refreshment, and corrupt drink or meat is there sold to him, which occasions his sickness, an action clearly lies against the tavern-keeper. That case is thus stated in 1 Roll. Abr., tit. Action sur Case (P.), pl. 1 & 2 — "If a taverner sells wine (knowing it to be corrupt) to another as sound, good, and not corrupt, without any express warranty, still an action of deceit lies against him, for there was a warranty in law. So, if I come into a tavern to eat, and the taverner gives and sells me '*bier et char corrupt, per que jeo suis mis en grand infirmitie*,' an action lies against him without express warranty, for it is a warranty in law." It is again stated thus, by Tanfield, C. B., and Altham, B., in *Roswell v. Vaughan*, Cro. Jac. 196: "If a man sells victual which is corrupt, without warranty,

<sup>1</sup> See the cases collected, 1 Vin. Abr. 561.

<sup>2</sup> "Brief de deceit sur le cas quare cum, etc., fuit port per A. against B. & C. . . . quare cum prædict' A. quendam buttam vini de Rumney de præfat' B. & C., prædict' C. sciens illam esse corruptam et inhabilem, warrantiz' esse habilem et non corruptam, p' quadam pecuniæ summa vendidit. . . . Rolf (for defendant) prayed judgment of the writ, for it is not stated that we warranted it to be good, and then it shall be adjudged the plaintiff's own folly. Martin (as it seems for plaintiff). The warranty is not material (n'e. a purpos); for it is enacted (ordeine) that no one shall sell corrupt victual [see post, p. 648]. Cottismore (apparently a judge). Ceo est actio popularis. Babington (apparently a judge). The warranty, as Martin has said, is not material (n'e. pas a purpos); car si jeo vien en un taverne a manger, et il don' et vend' a moy bier ou char corrupt', par le quel jeo suis mis en grand infirmite, j'aurai action envers luy sur mon cas clerement, et uncure il ne fist garranty a moy. Godred. It was lately adjudged in the King's Bench that if a man sells a piece of woollen cloth, knowing it to be rotten and ill fulled, 'et ceo fuit adjudge bon sans garranty.' And then West said that the wool was warranted, and so it was. Rolf, ridendo et protestando, that the plaintiff was a wine drawer, and yet knew nothing of wines, said for plea for B., that at the time of selling the wine, it was sufficient and fit or sound (suffic' et able). The court held that the plaint should be traversed; upon which he added, 'and not corrupt.' C.'s plea was, that he sold to plaintiff as B.'s servant, and in no other manner. Martin. You have deceived the plaintiff to your own knowledge (de vre' conis' demen')."

an action lies, because it is against the Commonwealth; as 9 Hen. VI. 53, 7 Hen. IV. 15,<sup>1</sup> and 11 Edw. IV. 6." The cases are collected in 1 Viner's Abridgment, 520. [Parke, B. Suppose that I, not being a seller of wine, import a pipe from Oporto, and on its arrival at the docks transfer it to you for a price, without seeing or tasting it, shall I be liable to an action if it proves bad?] The sale alone would impose that liability. [Alderson, B. There must be a difference between exposing food or wine for sale, and transferring a bargain in it. The case put in the Year Book of Hen. VI. is that of a general dealer, who, as such, may be bound at law to know the quality of the article he sells. Parke, B. You must contend that even if the seller is not a dealer in provisions, or does not warrant them, or is not guilty of any fraud, or has no knowledge of the particular article, he is liable if it be not sound, whether the buyer suffers illness in consequence or not. The case in the Year Book, 9 Hen. VI., on which that in Keilway seems to rest, is one of a taverner. Alderson, B. The Year Book, 11 Edw. IV. 6, lays down a general prohibition by law<sup>2</sup> to sell corrupt victual.<sup>3</sup> Whether the bad wine or food is sold by a general dealer in either, or not, the injury to the public from selling them is the same. Rolfe, B. The case in Croke James explains those in the Year Books, as turning on the scienter in the seller, or on the peculiar duty of a taverner.] The scienter is immaterial. On the same grounds of public danger, a servant's carrying a child afflicted with the small-pox along a public highway in which persons are passing, and near inhabited houses, is indictable. *Rex v. Vantandillo*, 4 M. & Sel. 73; 1 Russell on Crimes, by Greaves, 108. Kitchen on Courts Leet, 21, pl. 29, shows that a selling by butchers, fishmongers, and other victuallers, of any corrupt victual, not wholesome for men's bodies, was inquirable in the leet. Blackstone, in his Commentaries, Vol. III. p. 166, says, "In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy (viz. by action on the case to exact damages for the deceit) lies against him." *Gray v. Cox*, 4 B. & C. 108, E.

<sup>1</sup> This seems a mistaken reference to the Year Book.

<sup>2</sup> This seems to allude to Stat. Incert. Temp., c. 7, 1 Tomlins, Statutes at Large, 8vo, 388; see also the Statute of Pillory and Tumbrel, 51 Hen. III. c. 6, s. 3.

<sup>3</sup> Year Book, Trin. 11 Edw. IV. 6 B. Brian said, "Car si jeo vende a un homme xx herbits per tuer, s'ils sont corrupts, uncore si jeo garrante' eux, il n'avera acc' de disceit sur le garrantie, et ne sera travers, car qñt ils sont morts jeo ne puisse conustre q'ils sont corruptes, qñt jeo donc trust et confidence a vous, si jeo suis disceive, jeo aver' acc' de disceit, &c., mes si jeo vende mutton pur manger quel est corrupt, il aver' acc' de disceit, comt. jeo ne garr' cell'."

Nele. — En vostre case le cause est "p̄ q il est prohibe per le ley q' home vende vitale corrupted," &c. See statute 51 Hen. III. c. 6, s. 3, anno 1266–1267.

C. L. R., Vol. X., shows that the seller of an article undertakes that it shall be reasonably fit for the use for which it is intended. [Parke, B. That is confined to cases where he undertakes to manufacture it.<sup>1</sup>] Whatever a man does to the article to vary it from its natural state is sufficient, e. g. cutting up or skinning an animal. [Parke, B. The sole point for consideration is, whether an ordinary individual, not clothed with any character of general dealer in provisions, who *bonâ fide* sells meat for human consumption, is liable to an action on the case by the buyer of the article if it proves unsound. This is not the case of a butcher, or taverner, or farmer killing or exposing to sale meat in open market, who may be reasonably taken as impliedly warranting the meat to be sound. Would an indictment lie against an ordinary individual for so doing?] On principle there is no distinction between such an individual and any such trader, and both ought to be alike liable; for the sale of unsound meat is in itself illegal.

Whitehurst and Miller, in support of the rule. If a contract for sale of unsound meat is expressly forbidden by law, it is void, and no warranty can be implied by law to attach to it. Nor is there any distinct authority to prove what the plaintiff contends for; whereas it is clear law that where a man buys a specific article, no warranty arises, for the maxim of *caveat emptor* applies. *Chanter v. Hopkins*, 4 M. & W. 399. That applies to sales of food as well as of other chattels. If, on the contrary, a man orders an article to be made for a particular purpose, the party who undertakes to supply it is bound to furnish one fit for that purpose. *Shepherd v. Pybus*, 3 M. & Gr. 868; E. C. L. R. Vol. XLII.; 4 Scott, 434.<sup>2</sup> In *Chanter v. Hopkins*, Lord Abinger said, "A warranty is an express or implied statement of something which the party undertakes shall be a part of a contract, and, though part of the contract, yet collateral to the express object of it. But in many of the cases, the circumstance of a party selling the thing by its proper description has been called a warranty, and the breach of such contract a breach of warranty; but it would be better to distinguish such cases, as a non-compliance with a contract which a party has engaged to fulfil." [Parke, B., referred to the note to *Cutter v. Powell*, 6 T. R. 323, in *Smith's Leading Cases*, Vol. II.] *Parkinson v. Lee*, 2 East, 314, settles, that where a buyer has an opportunity of seeing part of the thing sold, no warranty is implied by law. Then do the old cases establish such a difference in the instance of selling unwhole-

<sup>1</sup> See 2 M. & Gr. 279 (40 E. C. L. R.); 4 M. & W. 402; 2 B. & Adol. 456 (22 E. C. L. R.); 5 Bing. 533 (15 E. C. L. R.).

<sup>2</sup> See *Brown v. Edgington*, 2 M. & Gr. 279 (40 E. C. L. R.).

some provisions for human food that a party is liable to an action for selling them, without knowing them to be unfit for food, or warranting them to be fit? Is every isolated act of selling such a dealing as makes the seller liable in case of the article proving bad? The strongest case in the affirmative is in the Year Book, 11 Edw. IV. 6 B., *ante*, p. 648, n.c. It was one of the judges who there said that the sale of corrupt victual was prohibited by law. It was there said, that if I sell a man twenty sheep to kill (which must mean for food), if they are rotten no action lies, because till killed no one can tell whether they are rotten or not; nor would the man who sells to kill have them in his possession, so as to know their state when dead. It would then be sufficient in the declaration to state a sale of food not being fit for the food of man. At the trial, the learned judge said there was a warranty in law, and left it to the jury only whether the pig was unwholesome when left at Penrose's stall, without asking them whether it was sold for use of man or not. [Parke, B. It was assumed throughout that it was. The simple point is, whether the bare allegation that the defendant sold not exposed to sale to the plaintiff, for the food of man, corrupt and unsound victuals, he not being a dealer in them, or proved to know them to be unsound, is sufficient to entitle the plaintiff to maintain an action for deceit.] Comyns, in his Digest, tit. Action on the Case for Deceit (E. 4), cites Kitchen, 174, to show that if a buyer of a horse has opportunity of discovering a (patent) defect in him by inspection, and does not, no action lies;<sup>1</sup> adding, "so, if a man sell corrupted wine if the vendee or his servant taste and approve of it." The case of a taverner is one where the article of food furnished to the guest is not selected by him in the first instance. So, if I order meat generally of a butcher, without selection, the implied contract is that the meat shall be good. [Parke, B. That is not the case of ordering a particular piece of meat to be sent home. The question in the taverner's case is, whether as such he was bound to supply sufficiently good meat,—resembling *Shepherd v. Pybus*, 3 M. & Gr. 868, E. C. L. R. Vol. XLII.; 4 Scott, 434. Alderson, B. Fitzherbert, in his *Natura Brevium*, 94 B., says, that if a man sells corrupt wine, or an unsound horse, without warranty, it is at the buyer's peril, "and his eyes and taste ought to be his judges in that case." The Year Books already mentioned are there cited.] All the cases collected in 1 Vin. Abr. 560, show that the liability of the seller turns on the scienter. As to the passage cited from 3 Bla. Com. 165, that in contracts for provisions it is always implied that they are wholesome, and if they are not, an action lies for

<sup>1</sup> See 2 Roll. R. 5; *Southern v. How*.



deceit, it admits of the same solution, viz. that if the contract be for provisions which are not seen, e. g. for shipping, a warranty of their being good and fit for that particular purpose is implied; whereas, if the contract was for a specific article of food brought before the eyes of the purchaser, it would not. All turns on the seller's knowledge, actual or presumed, of the condition of the food. It is presumed in the case of the taverner or butcher, as in the case of a jeweller who sold a pebble for a bezoar stone. The liability of such persons arises from the opportunity they have in dealing with the article, of knowing whether it is good or not. Here, between ordinary parties, no knowledge that the animal was corrupt can be presumed from their dealings. [Parke, B. It is put for the plaintiff, whether, by reason of fool being the subject of sale, this is not an exception to the general rule, so as to make the seller responsible on account of the common good, though no care could have discovered the latent defect.<sup>1</sup> If the only obligation here was to use due diligence to see that it was not corrupt, the plaintiff cannot succeed.] Without express warranty, or knowledge express or presumed of the latent unsoundness, the defendant cannot be liable. Now it was admitted that the defendant knew no more of the real condition of the carcass in question than the plaintiff himself.

*Cur. adv. vult.*

Parke, B., now delivered the judgment of the court. This was an action on the case, alleging that the defendant had publicly offered the carcass of a pig for sale and for the food of man, and had falsely and fraudulently warranted it to be wholesome and fit for food, whereby and by reason whereof the plaintiff was induced to buy it, and pay to the defendant a certain price for it. At the trial, before my brother Patteson, at the last assizes for the city of Lincoln, it appeared that the carcass in question was exposed for sale in a public street in the city of Lincoln, on the shambles of one Penrose, a butcher, and that the defendant bought it from him, but did not take it away. The plaintiff afterwards applied to Penrose to purchase the same carcass, and, being referred to the defendant as the person who had already bought it, he applied to him, and ultimately bought it from him, and paid the price agreed upon between them. It turned out, however, that the carcass was measly, and, having become putrid afterwards, was unfit for food, whereupon the plaintiff applied to the defendant to repay the price to him, and brought this action on the refusal of the defendant to

<sup>1</sup> See *Jones v. Bright*, 5 Bing. 533 (15 E. C. L. R.) cited 2 Steph. Comm. 127.

comply with such request. It did not appear that the defendant had any knowledge of the unsound condition of the pig, but it did appear that he was not a professed buyer and seller of meat; that he had not exposed this carcass publicly for sale; that, having bought it for his own use, he had left it with Penrose till it should be delivered to himself, and that there was a reasonable presumption that he knew it was intended for human food when he sold it to the plaintiff. On this state of things, the counsel for the defendant, Mr. Whitehurst, prayed for a nonsuit, but the learned judge permitted the case to proceed, reserving the point on the nonsuit. The verdict passed for the plaintiff, and a rule *nisi* for a nonsuit having been obtained, the case was fully argued during the sittings after the last term. On the part of the plaintiff the argument was, that the sale of victuals to be used for man's consumption differed from the sale of other commodities, and that the vendor of such, without fraud, would be liable to the vendee on an implied warranty. This position is apparently laid down in Keilway, 91; but the authorities there referred to, in the Year Books, 9 Hen. VI. 53 B., and 11 Edw. IV. 6 B., and others,<sup>1</sup> when well considered, lead rather to the conclusion that there is no other difference between the sale of food for man and other articles than this, viz. that victuallers and common dealers in victuals are not merely in the situation of common dealers in other commodities, nor are they liable under the same circumstances as they are, as, if an order be sent to them to be executed, they are to be presumed to undertake the supply of food and wholesome meat; and they are likewise punishable as a common nuisance for selling corrupt meat, by virtue of an ancient statute, and this certainly if they know the fact, and probably also if they do not. Such persons are therefore civilly responsible to those customers to whom they sell such victuals, for any special particular injury by the breach of the law which is thereby committed. Lord Coke lays it down that all persons, as well as common dealers, are liable criminally for selling corrupt meat; for he says,<sup>2</sup> speaking of the court leet: "This court may inquire of corrupt victuals as a common nuisance, whereof some have doubted, both for that it is omitted in the statute of the leet, and of the weak authority of the book of the 9 Hen. VI.,<sup>3</sup> where Martyn saith that it is ordained that none shall sell corrupt victuals; and Cotismore held opinion that it is *actio popularis*, whereupon it is collected that the conusance thereof belongeth to the leet; and Martyn and Neal, 11 Hen. IV., agreeing with him, said truly; for,

<sup>1</sup> 7 Hen. IV. 15, 16; 11 Hen. IV. 14, 15; 11 Hen. VI. 18.

<sup>2</sup> 4 Inst. 261.

<sup>3</sup> Viz. 53 B.

by the statute 51 Hen. III. and by the statute made in the reign of Edw. I. it is ordained that none shall sell corrupt victuals; and the statute 51 Hen. III. says that 'the pillory and tumbrel, and assize of bread and ale, applies only to vintners, brewers, butchers, and victuallers; and, among the other things, inquiry is to be made of the vintners' names, and if they sell a gallon of wine, or if any corrupted wine be in the town, or such is not wholesome for man's body; and if any butcher sell contagious flesh, or that died of the murrain, or cooks that see the unwholesome flesh.' Lord Coke then goes on to say that "Britton, who wrote after the statute 51 Hen. III. and following the same, saith, 'Puis soit enquis de ceux que achatent per un manere de mesure et vendent per meinder mesure faux, et ceux soient punis comes vendours de vines, et aussi ceux que serront attaintz de faux aunes et faux peys, et auxi de macegrievs,<sup>1</sup> et les gents que de usage vendent a trespassants mauveyse vians corrupus et nacrus et autrement perillous a la sauntie de home.' 'Et,' fol. 33, he doth conclude the like passage with these words: 'encontre le fourme de nous statutes.'"

This view of the case explains what is said in the Year Book, 9 Hen. VI. 53, that "the warranty is not to the purpose; for it is ordained that none shall sell corrupt victuals;" and in *Roswell v. Vaughan*, Cro. Jac. 196, where Tanfield, C. B., and Altham, B., say, "that if a man sells victuals which is corrupt without warranty, an action lies, because it is against the commonwealth." That also explains the note of Lord Hale, in 1 Fitzherbert's *Natura Brevium*, 94, that there is diversity between selling corrupt wines and merchandise; for there an action on the case does not lie without warranty; otherwise, if it be for a taverner or victualler, if it prejudice any. The defendant in this case was not dealing in the way of a common trader, and was not punishable by indictment for what he did; he merely transferred his bargain to the plaintiff, and at (his) own request. He therefore falls within the reason of the former part of Lord Hale's distinction; and there being no evidence of a warranty, or of any fraud, he is not liable. The plaintiff ought, therefore, to have been nonsuited at the trial, and this rule must be made absolute. Rule absolute.

Later, actions on the case for deceit were allowed for the simple breach of a parol promise.

- (a) First it was held no such action lay, because the plaintiff counted on a promise and showed no specialty.

<sup>1</sup> Macellarius, butcher or victualler.

- (b) Later, in the fifteenth century, it was held the action lay when the defendant had led the plaintiff to part with money or property on the strength of the defendant's promise.
- (c) Later, it was held that the action might be brought when the plaintiff had incurred any detriment by acting on the defendant's promise.

(5 a) WATTON *v.* BRINTH.

REPORTED Y. B. 2 HENRY IV. 3, PL. 9. ANNO 1400.

One Lawrence Watton brought a writ formed on special matter against Thomas Brinth, and the writ was of a plea, etc. Wherefore since the same T. had undertaken within a certain time to rebuild well and faithfully certain houses of this same Lawrence at Grimesby, yet the aforesaid T. did not take care to rebuild the houses of this same L. within the aforesaid time, etc., to the damage of this Lawrence [in the sum of] ten pounds, etc. And declares accordingly. Tirwit. Sir, you see well how he has counted of a covenant, and shows nothing for it, judgment, etc. Gas. And for as much as you answer nothing, we demand judgment, and pray our damages. Tir. This is merely a covenant. Bryn. The truth of the matter is this; if peradventure he had counted, etc., or if in the writ mention had been made that the thing had been begun, and [that] afterwards through negligence nothing more [was] done, it had been otherwise. Hank. He might have brought a writ on the statute of laborers, for that the carpenter is an artificer, by which you may have a good action against him on the statute; for you know well that a man may not have an action of covenant against his servant if he breaks his covenant, if he hath not a deed of it. Rikhill. For that you have counted of a covenant, and show nothing for that, you shall take nothing by your writ, but be in mercy T. 2 Hen. V. fol. M.; 11 Hen. IV. 4, fol. 33.

(5 b) Per Frowyk, C. J. "And so, if I sell you ten acres of land, parcel of my manor, and then make a feoffment of my manor, you shall have an action on the case against me, because I received your money, and in that case you have no other remedy against me. And so, if I sell you my land, and covenant to enfeof you and do not, you shall have a good action on the case, and this is adjudged. . . . And if I covenant with a carpenter, to build a house and pay him £20 for the house to be built by a certain day, now I shall have a

good action on my case because of payment of money, and still it sounds only in covenant and without payment of money in this case no remedy, and still if he builds it and misbuilds, action on the case lies. And also for nonfeasance, if money paid, case lies." Keilway, 77, pl. 25. [Anno 1504.]<sup>1</sup>

(5 c) "The gist of the action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property, it was obviously immaterial whether the promisor or a third person got the benefit of what the plaintiff gave up. It was accordingly decided, in 1520, that one who sold goods to a third person on the faith of the defendant's promise that the price should be paid, might have an action on the case upon the promise. This decision introduced the whole law of parol guaranty. Cases in which the plaintiff gave his time or his labor were as much within the principle of the new action as those in which he parted with property. And this fact was speedily recognized. In Saint Germain's book [Doctor and Student, Dialogue II. c. 24] published in 1531, the student of law thus defines the liability of a promisor: 'If he to whom the promise is made have a charge by reason of the promise . . . he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it.' From that day to this a detriment has always been deemed a valid consideration for a promise if incurred at the promisor's request." Ames, History of Assumpsit, 2 Harv. L. Rev. 1 at 14.

### WIRRAL v. BRAND.

IN THE KING'S BENCH. 1665.

REPORTED 1 LEVINZ, 165.

By a natural transition, actions upon parol promises came to be regarded as actions *ex contractu*.

Assumpsit against two executors on the promise of a testator; issue *non assumpsit*, one executor dies, which is suggested on the Roll, and the trial had against the other, and verdict for the plaintiff. And it was moved by Jones in arrest of judgment that the bill was abated by the death of the one in cases of contract, but otherwise in cases of trespass, as 50 Edw. III. 7; 40 Edw. III. 26 b; Fitz. Brief, 263, 344, & Plowd. Com. 186 b. In case of executors sued on a contract, the death of one abates the writ. But of this, in

<sup>1</sup> This decision marks the abandonment of the distinction between misfeasance and nonfeasance, in the case of promises given for money.

case of executors, the court at first doubted; but at another day having seen the case in *Plowd. 186, Woodward v. Davis*, which is directly in point, they resolved that the writ abated and stayed the judgment.<sup>1</sup>

<sup>1</sup> "The right of action for the breach of a contract upon the death of either party in general survives to and against the executor or administrator of each; but in the case of torts, when the action must be in form *ex delicto*, for the recovery of damages, and the plea not guilty, the rule at common law was otherwise; it being a maxim that *actio personalis moritur cum persona*. And we shall find that the statute 4 Edw. III. c. 7, [which provides for an action of trespass by executors for a wrong done to their testator] has altered this rule only in its relation to personal property, and in favor of the personal representative of the party injured; but if the action can be framed in form *ex contractu*, this rule does not apply. We will now consider the rule as it affects actions for injuries to the person, and to personal and real property.

"In the case of injuries to the person, whether by assault, battery, false imprisonment, slander, or otherwise, if either the party who received or committed the injury die, no action can be supported either by or against the executors or other personal representatives; for the statute 4 Edw. III. c. 7, has made no alteration in the common law in that respect; and the statute 3 and 4 Will. IV. c. 42, s. 3, only gives executors and administrators an action for torts to the personal or real estate of the party injured, and not for mere injuries to the person; and a promise to marry is considered of so personal a nature, that although the action for its breach is in form *ex contractu*, yet the executor of the party to whom the promise was made cannot sue.

"At common law, in the case of injuries to personal property, if either party died, in general no action could be supported, either by or against the personal representatives of the parties, where the action must have been in form *ex delicto* and the plea not guilty; but if any contract could be implied, as if the wrong-doer converted the property into money, or if the goods remained in specie in the hands of the executor of the wrong-doer, assumpsit for money had and received might be supported at common law by or against the executors in the former case, and trover against the executors in the latter. By the statute 3 Edw. III. c. 8, intitled 'Executors shall have an action of trespass for a wrong done to the testator,' and reciting 'that in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished,' it is enacted, 'that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they be, should have had if they were in life;' and this remedy is further extended to the executors of executors, and to administrators. It has been observed, that the taking of goods and chattels was put in the statute merely as an instance, and not as restrictive to such injuries only, and that the term 'trespass' must, with reference to the language of the times when the statute was passed, signify any wrong; and accordingly the statute has been construed to extend to every description of injury to personal property, by which it has been rendered less beneficial to the executor, whatever the form of action may be; so that an executor may support trespass or trover, case for a false return to final process, and case or debt for an escape, etc. on final process. And although it has been doubted whether an executor could sue for an escape on mesne process in the lifetime of his testator; it seems that on principle he might; and he may support debt for not setting out tithes; or against a tenant for double value for holding over; or against an attorney for negligence; or debt against an executor, suggesting a *devastavit* in the lifetime of the plaintiff's testator; or case against the sheriff for removing goods taken in execution, without paying the testator a year's rent; or an action of ejectment or *quare impedit*, for the disturbance of the testator. We will presently state the extension of remedy by 3 and 4 Will. IV. c. 42, s. 2.

"With respect to injuries to real property, if either party die, no action in form *ex*

(1) ELSEE AND ANOTHER *v.* GATWARD.

IN THE KING'S BENCH. 1793.

REPORTED 5 TERM REPORTS, 143.

A. agrees with B. without consideration to do something, and does not do it. B. suffers damage. A. agrees with B. without consideration to do something, and does it badly to B.'s damage. A. is liable for the misfeasance, not for the nonfeasance.

This was an action upon the case. The first count in the declaration stated that the plaintiffs on the 29th of August, 1791,

*delicto* could be supported either by or against his personal representatives before the 3 and 4 Will. IV. c. 42, s. 2; and although the statute 4 Edw. III. c. 7, might bear a more liberal construction, the decisions confined its operation to injuries to personal property; and therefore an executor could not support an action of trespass *quare clausum fregit*, or merely for cutting down trees or other waste in the lifetime of the testator: and though in *Emerson v. Emerson*, 1 Vent. 187; 2 Keb. 874; Sir W. Jones, 174, 177; 1 B. and P. 329, it was holden that a declaration by an executor for mowing, cutting down, taking and carrying away corn, might be supported, the allegation of the cutting down being considered merely as a description of the manner of taking away the corn, for which an action is sustainable by virtue of the statute; yet it was decided that if the declaration had been *quare clausum fregit, et blada asportavit*, it would have been insufficient; and that if the defendant had merely cut the corn and let it lie, or if the grass of the testator had been cut and carried away at the same time, no action could have been supported by the executor. We have seen, however, that an action may be supported by a devisee for the continuance of a nuisance erected in the lifetime of the testator. And a bill in equity, for an account of equitable waste committed by a tenant for life, may be maintained against his personal representatives.

"The 3 and 4 Will. IV. c. 42, s. 2, has introduced a material alteration in the common-law doctrine, *actio personalis moritur cum persona*, as well in favor of executors and administrators of the party injured, as against the personal representative of the party injured, but respects only injuries to personal and real property, and subject to certain restrictions as regards the commencement of an action for such injury within a short time after the death, and declaring that the damages to be recovered from an executor or administrator shall be ranked or classed with simple contract debts. The act recites, that there is no remedy provided by law for injuries to the real estate of any person deceased committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another, in respect of his property, real or personal: for remedy thereof it enacts, that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for an injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person; so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person, and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon

were about to build a warehouse, etc., and to rebuild and repair certain parts of a dwelling-house and stables, etc., and were desirous of having the warehouse completely tiled and covered in, and the front of the dwelling-house rebuilt, on or before the 1st of November then next, and also of having the bricklayers' and carpenters' works of the warehouse completely finished on or before the 1st of December, and the whole of the remaining repairs finished on or before the 25th of December then next, and thereupon the plaintiffs on the 29th of August, 1791, at the special instance and request of the defendant, who was a builder, and had full notice of the premises, retained and employed the defendant to do and perform all and singular the bricklayers' and carpenters' works which should be requisite on the occasion aforesaid within the several times hereinbefore mentioned for the completion thereof respectively; and although the defendant afterwards accepted of such retainer and employment upon the terms aforesaid, and could and ought to have completed all such bricklayers' and carpenters' works within the said respective times, yet the defendant contriving to injure the plaintiffs, etc., did not, nor would, completely tile or otherwise cover in the said warehouse, etc., on or before the said 1st of November, nor did nor would finish the bricklayers' and carpenters' works of the warehouse on or before the said 1st day of December, and the whole of the remaining repairs on or before the said 25th of December, etc., but on the contrary permitted the said warehouse to continue untiled and uncovered, etc., in consequence of which said neglect of the defendant the walls of the said premises were greatly sapped and rotted, and the ceilings damaged and spoiled, and the plaintiffs were obliged to continue tenants of another warehouse and stables, etc., and were thereby put to additional expense, etc. The second count stated that the plaintiffs on the 29th of August, 1791, being possessed of divers old materials of buildings, retained and employed the defendant at his instance and request to do and perform certain bricklayers' and carpenters' works upon divers buildings and premises of them the plaintiffs, and to use and apply in and about those works all such parts of the old materials as were fit and proper for that purpose, and that although divers parts of the said old materials were fit and proper to have been used and applied in and about the said works, yet the defendant, contriving to injure the plaintiffs in this behalf, and to enhance the expense of the bricklayers' and carpenters' works, did not nor would use and

themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such persons." Chitty, Pleading, Vol. I. pp. 77-80.



apply in and about the said works such parts of the old materials as were fit, etc., but refused so to do, and wrongfully and injuriously used and applied in and about the same works other new and expensive materials in the stead of such old materials as were fit and proper for the same purposes; whereby the plaintiffs were put to an unnecessary expense, etc., and the old materials became wholly useless, etc. There was a third count in trover for the old materials.

The defendant demurred to the two first counts; alleging for causes that, notwithstanding the whole of the supposed causes of action in those courts were in the nature of a nonfeasance, and consisted in the nonperformance of certain matters and things in those counts mentioned as having been omitted to be done by the defendant, it was not stated in either of those counts, nor did it thereby appear, that the defendant by any promise, undertaking, contract, or agreement, was bound to the performance of those several matters or things, etc. That, although the several supposed causes of action in those counts were founded upon implied contracts in law, no sufficient ground or consideration to raise or support such implied contracts was stated. That there was not stated, nor did it appear, in those counts that there was any promise or contract on the part of the defendant, upon which the breaches in those counts could operate. And that those counts did not contain any cause of action against the defendant, etc. The parties went to trial, when a verdict was given for the defendant on the count in trover, and conditional damages assessed for the plaintiffs on the two counts demurred to.

Park, in support of the demurrer.

Marryatt, *contra*.

Lord Kenyon, Ch. J. If this had been an action of *assumpsit*, it could not have been supported for want of a consideration: it would have been *nudum pactum*. And if both the counts be not good, the defendant is entitled to judgment. Now, I do not think that the first count in the declaration is good in law. It states that the defendant, who is a carpenter, was retained by the plaintiffs to build and to repair certain houses; but it is not stated that he was to receive any consideration, or that he entered upon his work. No consideration results from his situation as a carpenter, nor from the undertaking; nor is he bound to perform all the work that is tendered to him; and therefore the amount of this is that the defendant has merely told a falsehood, and has not performed his promise; but for his nonperformance of it no action can be supported. This is warranted by Lord Holt's opinion in *Coggs v. Bernard*, where, recognizing the case in 11 Hen. IV. 33,

he said, "There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie." And on this opinion I think I may safely rely, especially as the justice of the case will not be altered by the form of the action; for if assumpsit will not lie in such a case, there is no technical reasoning that will support such an action as for a tort. In that case Powell, J., said, "an action will not lie for not doing the thing for want of a sufficient consideration; but if the bailee will take the goods into his custody, he shall be answerable for them; for the taking of the goods into his custody is his own act." Lord Holt there put several cases to establish this position, which will reconcile the cases now cited on the part of the plaintiffs. In *Brown v. Dixon*, the defendant had received the dog into his possession. This case is very distinguishable from those of common carriers and porters, from whose situations certain duties result; they are bound by law to carry goods delivered to them, and are by law entitled to a recompense: but no such duty results from the situation of a carpenter; he is not bound, as such, to perform all the work that is brought to him. It appears to me, therefore, that the first count cannot be supported, there being no consideration expressly stated, nor any consideration resulting from the defendant's employment as a carpenter; though, had the defendant performed the work, he might have recovered a satisfaction on a *quantum meruit*. Upon the authority of *Coggs v. Bernard*, and the cases there noticed, not contradicted by any other decision, I think that the first count, for nonfeasance, is bad, but that the second count may be supported. It is there stated that the defendant entered upon his employment, and that he did not do that which he ought to have performed according to his retainer. In that count it is stated that he undertook to use the old materials, that in fact he did not use those, but substituted new ones in their stead, thereby enhancing the expense to the plaintiffs. This comes within the case mentioned by Lord Holt in *Coggs v. Bernard*, speaking of the same case in the Year Books, "but there the question is put to the court what if he had built the house unskilfully; and it was agreed in that case an action would have lain." For though the defendant could not have been compelled to build this house, and to use the old materials, yet having entered upon the contract, he was bound to perform it; and not having performed it in the manner proposed, an action lies against him.

Ashhurst, J. The second count may be maintained, inasmuch as it appears that the defendant was retained by the plaintiffs, that

he entered upon the work in consequence of that retainer, and that he did not perform it according to the terms of the retainer, by using new materials instead of the old, which subjected the plaintiffs to a considerable expense. This amounts to a misfeasance on the part of the defendant, and may be the foundation of an action. But the first count cannot, I think, be supported. The distinction is this: if a party undertake to perform work, and proceed on the employment, he makes himself liable for any misfeasance in the course of that work; but if he undertake, and do not proceed on the work, no action will lie against him for the nonfeasance. In this case, the defendant's undertaking was merely voluntary, no consideration for it being stated. There was no custom of the realm, or any legal obligation, to compel him to perform this work; and that distinguishes this case from those of a common carrier, porter, and ferryman, who are bound from their situations in life to perform the work tendered to them; but a carpenter, as such, is not bound by any such obligation. This count is merely for nonfeasance, and it does not state that the defendant entered upon the employment. It is indeed alleged that he did not finish the work, from whence the plaintiffs wish the court to infer that he had begun upon it; but as that is the gist of the action, it should have been stated expressly. Nor is it a necessary inference to be drawn from the facts stated; for, consistently with everything alleged, the defendant may not have begun the work at all. But it has been contended that it was not necessary to allege that the defendant was employed to perform this work for hire and reward, it being stated that he was retained, and that *indebitatus assumpsit* would have lain by the defendant if he had performed it. I admit that the defendant might have recovered a satisfaction in such an action, if he had executed the work: but in order to compel him to perform it, it should appear that there was an express consideration for it; the word "retain" does not necessarily show that there was a consideration.

Grose, J. The jury having given damages on both the counts jointly, it becomes necessary to consider them both, because if either be bad, the defendant will be entitled to judgment; and it appears to me that they fall under different considerations. The first count is for confesance, and it alleges a promise without showing any consideration for it. It has been argued that if the defendant had performed the work, he might have maintained an action for a satisfaction for his labor: but that does not necessarily follow; it must have depended upon circumstances; perhaps he engaged to do the work gratuitously, and if so, he could not have recovered in

an action: however, this does not appear one way or the other on the face of the declaration. That such an action as this cannot be supported is clear from the opinions of Holt, Ch. J., and Powell, J., as delivered in *Coggs v. Bernard*, who founded their opinions on a case in the Year Books, which they considered as law. There the gravamen was like the present; and after Tilsby, who was counsel for the defendant, had objected to the action, Norton, the plaintiffs' counsel, asked what would have been the consequence if the defendant had built the house badly; not putting the case of not building the house; to which one of the judges answered, that in such a case an action would have lain for the wrong. But when a person agrees to do a thing without any consideration, and fails in his promise, no action will lie against him for the nonperformance. And Rolle, in mentioning this case in 11 Hen. IV., considers it to have been determined on account of the want of consideration. Therefore that case is directly in point; for this is an action for nonfeasance, without any consideration; it is not stated that the defendant entered upon the work, or undertook it for any reward; which is one of the instances mentioned by Powell, J., in *Coggs v. Bernard*, in which he thought no action would lie. The first count, therefore, cannot be supported. But the second may, on the reasoning in *Coggs v. Bernard*; for it is for misfeasance. The defendant is bound in consequence of having entered upon the work; and whether the work were or were not to be performed for hire, the defendant was not to injure the plaintiffs; and here considerable expenses were incurred in consequence of his using the new, instead of the old materials. This is a misfeasance, and on that ground I think that the second count may be supported.

*Per curiam.*

Judgment for the defendant.<sup>1</sup>

### COGGS v. BERNARD.

IN THE QUEEN'S BENCH. 1703.

REPORTED 1 SALKELD, 26; S. C. 2 LORD RAYMOND, 909; S. C. COMYNS, 133.

A. agrees with B., without consideration, to do something for B. and does it badly, to B.'s damage. Case for misfeasance will lie.

Case: whereas the defendant assumpsit to take up a hogshead of brandy in a cellar in D. and safely to lay it down in another cellar, that he *tam negligenter* laid and put it down in another cellar, that for want of care the cask was staved, and so much brandy was lost. Objected, in arrest of judgment, That there is no considera-

<sup>1</sup> The arguments of counsel are omitted.

tion; for the defendant is not to have a reward, and it does not appear he is a common carrier, or porter, so as to be entitled to a reward; he is only to have his labor for his pains, so that this is *nudum pactum* without consideration. But by Holt, C. J. If the agreement had been only executory, as that he assumed to carry it, and did not, no action would have lain. Like the case of 11 Hen. IV. 33. Action, for that he promised to build him a house by such a day, and did not; adjudged it lay not in that case; but here he was actually entered upon the thing according to his promise, and therefore having miscarried, he is liable to an action; for it is a deceit upon the plaintiff who trusted him, and that is the cause of action; for though he was not bound to enter upon the trust, yet if he does enter upon it, he must take care not to miscarry, at least by mismanagement of his own. *Aliter*, perhaps, if a drunken man had run upon him in the street, and thrown down the cask, or one had privately pierced it, because he had no reward. It is indeed held in Yelv. 128 that if H. deliver goods to A. and in consideration thereof he promise to redeliver them, that yet no action will lie for not redelivering them; but that resolution is not law, and was always grumbled at. And 2 Cro. 667, where money was delivered to pay over *sine mora*, is contrary; for though the party has no benefit, yet if he takes the trust upon him, he is bound to perform it. *Vide* 3 Hen. VI. 26; Dr. & Stud. 129; Owen, 141; Keb. 160.

Judgment *pro quer per totam cur.*<sup>1</sup>

## INDEBITATUS ASSUMPSIT.

“The defendant, having become indebted, has undertaken.”

### ORIGIN OF THE ACTION.

“The origin of *indebitatus assumpsit* may be explained in a few words: Slade’s Case [4 Rep. 92 *a*; Yelv. 21; Moore, 433, 667], decided in 1603, is commonly supposed to be the source of this action. But this is a misapprehension. *Indebitatus assumpsit* upon an express promise is at least sixty years older than Slade’s Case. The evidence of its existence throughout the last half of the sixteenth century is conclusive. There is a note by Brooke, who died in 1558, as follows: ‘Where one is indebted to me, and he promises to pay

<sup>1</sup> In the report in Lord Raymond, almost the whole of the fundamental law of bailment is laid down. *Vide* 1 H. Bl. Rep. 158; Jones’s Law of Bailment, *per totum*; Elsee v. Gatward, 5 T. R. 151.

before Michaelmas, I may have an action of debt on the contract, or an action on the case on the promise.' In *Manwood v. Burston* [2 Leon. 203, 204] (1588), Manwood, C. B., speaks of three manners of considerations upon which an assumpsit may be grounded: (1) A debt precedent; (2) where he to whom such a promise is made is damnified by doing anything, or spends his labor at the instance of the promisor, although no benefit comes to the promisor; . . . (3) or there is a present consideration." Ames, *History of Assumpsit*, 2 Harv. L. Rev. 1 at 16.

### SLADE'S CASE.<sup>1</sup>

IN THE KING'S BENCH. 1603.

REPORTED 4 REPORTS, 92 b.

Every contract executory imports in itself an assumpsit.

John Slade brought an action on the case in the King's Bench against Humphrey Morely (which plea began Hil. 38 Eliz. Rot. 305) and declared, that whereas the plaintiff, 10th of November, 36 Eliz., was possessed of a close of land in Halberton, in the county of Devon, called Rack Park, containing by estimation eight acres for the term of divers years then and yet to come, and being so possessed, the plaintiff, the said tenth day of November, the said close had sowed with wheat and rye, which wheat and rye, 8 Maii, 37 Eliz., were grown into blades, the defendant, in consideration that the plaintiff, at the special instance and request of the said Humphrey, had bargained and sold to him the said blades of wheat and rye growing upon the said close (the tithes due to the rector, etc., excepted) assumed and promised the plaintiff to pay him £16 at the feast of St. John the Baptist then to come; and for nonpayment thereof at the said feast of St. John Baptist, the plaintiff brought the said action; the defendant pleaded *non assumpsit modo et forma*; and on the trial of this issue the jurors gave a special verdict, *sc.* that the defendant bought of the plaintiffs the wheat and rye in blades growing upon the said close as aforesaid, *prout* in the said declaration is alleged, and further found that between the plaintiff and the defendant there was no other promise or assumption but only the said bargain; and against the maintenance of this action divers objections were made by John Dodderidge of counsel with the defendant.

<sup>1</sup> The case is not reported in full; the arguments of Dodderidge and so much of the opinion of the court as does not bear upon the matter in hand are omitted.

And for the honor of the law, and for the quiet of the subject in the appeasing of such diversity of opinions (*quia nil in lege intolerabilius est eandem rem diverso jure censi*) the case was openly argued before all the Justices of England and Barons of the Exchequer; s. c. Sir John Popham, Knt., C. J. of England, Sir Edm. Anderson, Knt., C. J. of the Common Pleas, Sir W. Periam, Chief Baron of the Exchequer, Clark, Gawdy, Walmesly, Fenner, Kingsmill, Savil, Warburton, and Yelverton, in the Exchequer Chamber, by the Queen's Attorney-General for the plaintiff, and by John Dodderidge for the defendant, and at another time the case was argued at Sergeant's Inn, before all the said Justices and Barons, by the Attorney-General for the plaintiff, and by Francis Bacon for the defendant, and after many conferences between the Justices and Barons, it was resolved, that the action was maintainable, and that the plaintiff should have judgment. And in this case these points [among others] were resolved.

3. It was resolved, that every contract executory imports in itself an assumpsit, for where one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay, or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, in that case both parties may have an action of debt, or an action on the case on assumpsit, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt, and therewith agrees the judgment in Read and Norwood's Case, Pl. Com. 128.

4. It was resolved that the plaintiff in this action on the case on assumpsit should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in this action would be a good bar in an action of debt brought upon the same contract; so *vice versa*, a recovery or bar in an action of debt is a good bar in an action on the case on assumpsit. *Vide* 12 Edw. IV. 13 a; 2 R. 3, 14; (32) 33 Hen. VIII. Action *sur le Case*, Br. 105.

5. In some cases it would be mischievous if an action of debt should be only brought, and not an action on the case, as in the case *inter* Redman and Peck, 2 and 3 Ph. and Mar. Dyer, 113, they bargained together, that for a certain consideration Redman should deliver to Peck twenty quarters of barley yearly, during his life, and for nondelivery in one year, it is adjudged that an action well lies, for otherwise it would be mischievous to Peck, for if he should be driven to his action of debt, then he himself could never have it,

but his executors or administrators, for debt doth not lie in such case till all the days are incurred, and that would be contrary to the bargain and intent of the parties, for Peck provides it yearly for his necessary use; so 5 Mar. Br. Action *sur le Case*, 108, that if a sum is given in marriage to be paid at several days, an action upon the case lies for nonpayment at the first day, but no action of debt lies in such case till all the days are past. Also it is good in these days in as many cases as may be done by the law, to oust the defendant of his law, and to try it by the country, for otherwise it would be the occasion of much perjury.

### PECKE v. REDMAN.<sup>1</sup>

IN THE KING'S BENCH. 1555.

REPORTED DYER, 113 A.

Mutual promises are the support of each other.

In B. R. a verdict given at the last assize by *nisi prius* for the plaintiff in an action upon the case upon an assumpsit was traversed. And the case was, That one Pecké and one Redman bargained to-

<sup>1</sup> "The rule that mutual promises are the consideration for each other has been recognized since 1555." Harriman on Contracts, § 94, citing Ames, Parol Contracts Prior to Assumpsit, 8 Harv. L. Rev. 259; Pecke v. Redman, Dyer, 113 a, decided in 1555. The case does not support the proposition.

Three possible explanations of the decision in Pecke v. Redman, Dyer, 113 a, suggest themselves. An action on the case was in the nature of a bill in equity. Assumpsit was an offspring of case, inheriting its characteristics. Ashby v. White, 2 Ld. Raym. 938; Bird v. Randall, 3 Burr. 1253; both reported *supra*. Debt would not lie for the plaintiff, since the cause of action necessary to sustain debt could accrue only to his executors. Slade's Case, 4 Rep. 92 b, reported *supra*. Nor would covenant lie. There was no specialty. Hence, unless a remedy were given the plaintiff outside of these, he could not recover. But the law will not allow a right to be without a remedy. Ashby v. White, 2 Ld. Raym. 938, reported *supra*. Hence assumpsit (or better, an action on the case on the defendant's undertaking) was given to the plaintiff.

Again, consideration involves the parting with a legal right. This is lacking in the case of mutual promises. Where is there a gain to the promisor, or a loss to the promisee? Shall we not say, therefore, that the case of mutual promises furnishes an anomaly in the law of contracts and consideration, parallel to the case of a specialty?

We often hear it said that the presence of a seal on an agreement raises a presumption of consideration. Nothing could be more erroneous. We have already seen cases decided before the modern doctrine of consideration was ever conceived of, holding that unsealed acquittances were worthless. Y. B. 30 Edw. I. 159, reported *supra*; Fleta II. c. 60, § 25. "By parol the party is not obliged," Y. B. 29 Edw. III. 25, 26. This because of a rule of procedure. See remarks of Sir John Davies, Attorney-General of Ireland, quoted *supra*. The fact is, that a specialty requires no consideration; and that is an end of the matter. There is no "presumption" about it. So in the case of mutual promises, it would seem a more correct statement of the law



gether in the second year of Edw. VI. that Redman should deliver or cause to be delivered to the plaintiff (who was Pecke) twenty quarters of barley every year during their two lives between certain days, and showed them in certain, and that the plaintiff should pay four shillings for each quarter; and showed in the count that the defendant broke his promise, s. that he failed in payment of the forty quarters for three years, whereby the plaintiff was damnified in his credit and profit to the amount of £30. And the defendant pleaded in bar a condition in the said bargain, without this, that he undertook in manner and form, etc., and the plaintiff è contra. And it was found for the plaintiff, and damages assessed at £4, besides costs, etc. The question is, Whether the plaintiff shall recover the damages in recompense for the whole bargain as well for the time to come, as for the past, or not? because it seemed to divers judges, s. Brooke, Saunders, and Brown, that this contract, which has a continuance, cannot be intended to be recompensed in the damages assessed above, s. for the time to come, for they cannot have knowledge of what that will be. And Portman, Whyddon, and Stamford, è contra. Ideo quære bene.

“Although the right to trial by jury was the principal reason for a creditor’s preference for *indebitatus assumpsit*, the new action very soon gave plaintiffs a privilege which must have contributed greatly to its popularity. In declaring in debt, except possibly upon an account stated, the plaintiff was required to set forth his cause of action with great particularity. Thus, the count in debt must state the quantity and description of goods sold, with the details of the price, all the particulars of a loan, the names of the per-

to say that mutual promises require no consideration, than to affirm that they are the consideration for each other.

Another explanation may occur to the learned reader. In Bracton we find something akin to mutual promises.

“An obligation is contracted verbally by a stipulation, for a stipulation is a form of words, which consists of a question and an answer, as if it should be said, Do you promise? I promise. Will you give? I will give. Will you do it? I will do it. Do you pledge yourself? I do pledge myself.” [Observe that these are not cases of mutual promises.]

Is it not more probable that when *Pecke v. Redman* was decided, the judges and attorneys were thinking of a modification of the consensual obligation of the Roman law that Bracton knew, than of any theory of consideration, which word is not mentioned or indicated or implied in the case, and which they would have to inject into it without precedent? Is it not the form of words that binds? and is not the binding form of words of 1555 only a survival of the binding form of words of Bracton’s day? Granted, the form of words is modified, but it is still a form of words. And if that be true, can it be safely said to-day that mutual promises are the consideration for each other? No. Consideration is only another name for form, and the form of words (i. e. mutual promises) supplies it. Bracton, f. 99 b. Cf. *Pillans v. Van Mierop*, 3 Burr. 1663; *Holmes, C. L. 259*; *Sharington v. Strotton*, Plowden, 298.

sons to whom money was paid, with the amounts of each payment, the names of the persons from whom money was received to the use of the plaintiff, with the amounts of each receipt, the precise nature and amount of services rendered. In *indebitatus assumpsit*, on the other hand, the debt being laid as an inducement or conveyance to the assumpsit, it was not necessary to set forth all the details of the transaction from which it arose. It was enough to allege the general nature of the indebtedness, as for goods sold,<sup>1</sup> money lent,<sup>2</sup> money paid at the defendant's request,<sup>3</sup> money had and received to the plaintiff's use,<sup>4</sup> work and labor at the defendant's request,<sup>5</sup> or upon an account stated,<sup>6</sup> and that the defendant being so indebted promised to pay. This was the origin of the common counts." Ames, History of Assumpsit, 2 Harv. L. Rev. 57.

### RUDDER v. PRICE.

#### *Extract.*

REPORTED 1 HENRY BLACKSTONE AT 551.

Per Loughborough. "The history of the action of assumpsit given by Lord Coke in the second resolution in Slade's Case is incorrect; the cases which he there cites show that the manner in which the action was brought prior to Slade's Case was by stating not a general *indebitatus assumpsit*, for it was not brought merely on a promise, but special damage for a nonfeasance, by which a special action on the case arose to the plaintiff." <sup>7</sup>

### HARD'S CASE.

IN THE KING'S BENCH. 1697.

REPORTED 1 SALKELD, 23.

*Indebitatus assumpsit* will lie in no case but where debt lies, therefore it lies not upon a wager, nor upon a mutual assumpsit, nor against the acceptor of a bill of exchange; for his acceptance is

<sup>1</sup> Hughes v. Rowbotham (1592), Poph. 31; Woodford v. Deacon (1608); Cro. Jac. 206; Gardiner v. Bellingham (1612), Hob. 5; 1 Roll R. 24, s. c.

<sup>2</sup> Rooke v. Rooke (1610), Cro. Jac. 245; Yelv. 175, s. c.

<sup>3</sup> Moore v. Moore (1611), 1 Bulst. 169.

<sup>4</sup> Babington v. Lambert (1616), Moore, 854.

<sup>5</sup> Russell v. Collins (1669), 1 Sid. 425; 1 Mod. 8; 1 Vent. 44; 2 Keb. 552, s. c.

<sup>6</sup> Brinsley v. Partridge (1611), Hob. 88; Vale v. Egles (1605), Yelv. 70; Cro. Jac. 69.

<sup>7</sup> Accordingly, in the case of 20 Hen. VII. 9, as cited by Fitz-James, Dyer, 22 b, the action was brought for the special damage on account of the nonperformance of the contract to deliver corn to the plaintiff, by which he was obliged to buy other corn at a higher price. See 27 Hen. VIII. 24-25; 20 Hen. VII. 8; 12 Edw. IV. 13.

but a collateral engagement. But it lies against the drawer himself, for he was really a debtor by the receipt of money, and debt would lie against him.

BOVEY *v.* CASTLEMAN.

IN THE KING'S BENCH. 1696.

REPORTED LORD RAYMOND, 69.

*Indebitatus assumpsit.* The plaintiff declares that there was an agreement between the defendant and him, that if the Duke of Savoy made an incursion into Dauphine within such a time, that then the plaintiff should give the defendant £100. And if the Duke did not make the incursion into Dauphine within the time limited, that then the defendant should give to the plaintiff £100, which agreement was reduced into writing and signed by both the parties: and the plaintiff avers that the Duke of Savoy did not make any incursion into Dauphine within the time limited; by which the defendant became indebted to the plaintiff in £100, and being indebted assumed to pay, etc. Upon *non assumpsit* pleaded, verdict for the plaintiff. And now Mr. Northey moved in arrest of judgment, that there was not any consideration to raise a debt, for no debt can arise between the plaintiff and defendant upon the incursion of the duke. For it is but a wager, for which *indebitatus assumpsit* will not lie, because there wants a real consideration. But for mutual promises assumpsit may lie, but not *indebitatus assumpsit*. For *indebitatus assumpsit* will lie only in cases where debt will lie, but in this case debt cannot lie. *Quod fuit consessum per totam curiam.* And therefore judgment was given *quod querens nil capiat per billam.*

WALKER *v.* WALKER.

IN THE KING'S BENCH. 1694.

REPORTED HOLT, 328.

Action for money won on a wager, by a general *indebitatus assumpsit*; after verdict, counsel moved in arrest of judgment, for that it is not a good promise in law, and there is no debt.

Holt, C. J. This is merely a wager, and no *indebitatus assumpsit* lies for it; for to make that lie, there must be work done, or some meritorious action for which debt lieth; and here this wager is due in a collateral respect. It is true, the cast of a die alters the property, if the money be staked down, because it is then a gift on con-

dition precedent, and an *indebitatus assumpsit* lies against him that holds the wager, for it is a promise in law to deliver it if won. After this verdict, if it could be any ways made good, we would do it; but a verdict cannot make good that which is bad in law. Let it stay; we will consult the judges in the Exchequer Chamber.<sup>1</sup>

If on the loss of the wager, the defendant had promised the next day to pay it, yet an *assumpsit* would not lie thereon, because it wants consideration, it being but executory.

## THE EARL OF FALMOUTH *v.* PENROSE.

IN THE KING'S BENCH. 1827.

REPORTED 6 BARNEWALL AND CRESSWELL, 385.

*Indebitatus assumpsit* will lie for goods and chattels.

This was an action of *assumpsit* brought by the plaintiff, to try his right to have the second-best fish out of the cargoes of all fishing boats landing in a certain cove, called Senn Cove, in the county of Cornwall, in respect of his liability to keep up a capstan and rope there for the purpose of hauling the boats out of the sea. The declaration contained several special counts in which it was alleged that the plaintiff was entitled to the second-best fish of all sorts of fish. There were also several *indebitatus* counts, in which it was stated that the defendants were indebted to the plaintiff in divers, to wit, 100 fish of the value of £10, for divers tolls, or dues, due and of right payable from the defendants to the plaintiff, on and in respect of the defendants having before then used and enjoyed, and having had the liberty and privilege of using and enjoying divers capstans, machines, windlasses, and ropes of the plaintiff, to haul and assist in the hauling of divers boats of the defendants, and of divers other boats which the defendants had used on the beach, to wit: at, etc., in the county aforesaid; and being so indebted, etc. Plea, general issue. At the trial before Gaselee, J., at the summer assizes for the county of Cornwall, 1826, it appeared that the practice had been for the owner of every fishing boat landing its cargo in Senn Cove, to select a fish for himself, and for the plaintiff's agent to select another, which fish so selected was rendered to the plaintiff. But it was doubtful on the evidence, whether the practice had been to render the second-best fish of all sorts of fish, or only the second-best fish of all sorts, pilchards excepted; and that

<sup>1</sup> The greater number of the judges in the Exchequer Chamber disagreed with Lord Holt, but he continued to hold that the remedy for the recovery of money lost at play was by special action on the case. *Eggleton v. Lewin*, Holt, 330.

question was finally submitted to the jury, who found the custom to have been to render the second-best fish of all sorts of fish, pilchards excepted. A verdict was found for the plaintiff on the *indebitatus* counts, but leave was given to the defendants to move to enter a nonsuit, if the court should be of opinion that these counts were not supported by the evidence. A rule *nisi* having been obtained for that purpose, R. Bayley and Carter now showed cause.<sup>1</sup>

C. F. Williams and Halcomb, *contra*.

Bayley, J. The only question is, whether the plaintiff can in this case recover upon a general *indebitatus* count. There are authorities to show that debt will lie for a chattel. If so, we see no reason why assumpsit will not also lie, but then the promise as well as the consideration must be proved. Upon the evidence, it appears that it was the custom for the plaintiff or his agent to select his fish, and that the selection being made, the same was rendered to him. If, therefore, the defendant had refused to render the fish so selected, or had refused to let the plaintiff select one, he might have maintained a special action on the case for damages; but there was no legal liability on the part of the defendant to pay any given fish to the plaintiff before selection, and consequently no promise is implied by law on his part to do so. The plaintiff, therefore, has failed to prove any assumpsit or promise on the part of the defendant to render fish. The rule for a nonsuit must therefore be made absolute.

Holroyd and Littledale, Js., concurred.

Rule absolute.

## HORATIO N. HOLBROOK *v.* DAVID DOW.<sup>2</sup>

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1861.

REPORTED 1 ALLEN, 397.

*Indebitatus assumpsit* lies upon a special contract, so far executed that naught remains but the payment of money.

N. Morse, for the defendant.

B. Dean, for the plaintiff.

Hoar, J. It is a familiar principle of pleading that when a special contract has been executed so far that nothing remains but the payment of money, it is not necessary to declare upon the contract, but a count in *indebitatus assumpsit* will be sufficient. 2 Greenl. Ev. § 104; Felton *v.* Dickinson, 10 Mass. 287. . . .

The defendant was the plaintiff's assignee in insolvency; and the

<sup>1</sup> The arguments of counsel are omitted.

<sup>2</sup> The reporter's statement of facts and part of the opinion are omitted. — ED.

plaintiff testified that, in consideration that he would procure the settlement of a suit which had been brought against him by one Coleman, the defendant promised to obtain the assent of the plaintiff's creditors to his discharge, give up certain account books, pay Coleman \$100, and pay the plaintiff the sum of \$54, the same being the amount of an allowance which the plaintiff claimed the commissioner had decreed to him. He further testified that he did procure the settlement of the suit, and that the defendant performed the contract on his part, except the payment of the \$54. If, then, the jury were satisfied that the promise to pay the \$54 was absolute — to pay that sum of money in consideration of the settlement of the suit, and not merely to pay the allowance to which the plaintiff was entitled from his estate — the form of declaring was sufficient, and there was no variance between the declaration and the proof. . . .

Exceptions overruled.

### JONES *v.* HOAR.<sup>1</sup>

SUPREME JUDICIAL COURT OF MASSACHUSETTS. OCTOBER, 1827

REPORTED 5 PICKERING, 285.

One cannot waive a tort and sue in contract unless there is a contract, express or implied, between the parties.

Assumpsit upon a promissory note, for goods sold and delivered, and for money had and received. The case came before the court upon an agreed statement of facts.

<sup>1</sup> The right of a plaintiff to "waive the tort and sue in contract" is, in certain cases, a matter of dispute. In *Centre Turn Pike Co. v. Smith*, 12 Vt. 212, at 217, Redfield, J., says, "We know there are many cases in which a person is virtually made liable in assumpsit for a tort. But those cases may be resolved into four classes, none of which include the present [which was to recover toll of the defendant for passing the gate on the plaintiff's turnpike, in *Hancock*]. 1. Where the defendant has taken personal property and converted it into money. *Gilmore v. Wilbur*, 12 Pick. 120. By Jackson, J., in *Cummings v. Noyes*, 10 Mass. 433. By Lord Mansfield, in *Hambly v. Trott*, Cowper, 373. But in these cases the chattels must have been actually converted into money. Such is the language of the books. I find but one case where chattels have been taken by force, and not converted into money, that assumpsit has been sustained, and that case rests upon no very satisfactory basis. *Hill v. Davis*, 3 N. H. 386. [In *Hill v. Davis* the facts were these: "the plaintiff, in the summer of 1816, contracted to underpin the defendant's house with hewn stone, and the stones, mentioned in the plaintiff's declaration, were furnished for that purpose. But it being found that the same stones would not answer for that purpose, they were not used, but were left near the house of the defendant by the plaintiff, until the fall of that year, when the defendant built a dairy, and put into it the same stones. In the fall of 1817 there was a final settlement between the parties for the underpinning of the house. There never was any contract for the sale of these stones, but at said settlement, Hill said, that they

The defendant brought a sum of money into court generally, "on account and in satisfaction of the plaintiff's damages in the suit."

were taken without leave, and Davis, that they were worth nothing." Hill brought assumpsit against Davis. The issue was, Had Hill misconceived his action? The court said, No. Per Richardson, C. J. "It has been contended, that the case states that there was no contract, and that, therefore, we are not at liberty to say there was a contract. But it seems to us that we are bound to understand by that admission that there was no express contract, and not that there was no contract whatever. For the question submitted to us is, whether assumpsit lies on the facts agreed; in other words, whether there was any contract, express or implied, on which assumpsit might be maintained; and an admission that there was no contract, express or implied, amounts to an admission that the action cannot be maintained."]

"2. When the defendant obtains the goods surreptitiously, under color of sale. *Chitty on Contracts*, 19; *Hill v. Prescott*, 3 Taunt. 274; *Edmeads v. Newman*, 8 E. C. L. 116. In the latter case, the defendant came fairly by the bills, but fraudulently obtained the money upon them. The case of *Clark v. Shee*, Cowper, 197, is of the same character.

"3. Where one employs the apprentice of another, even when he did not know of the apprenticeship, he is liable in assumpsit for work and labor. *Lightly v. Clouston*, 1 Taunt. 112; *Bowes v. Tibbets*, 7 Greenleaf's R. 457. See, also, *Eades v. Vandeput*, 5 East, 39, which involves the same principle.

"4. Where the defendant, under false color, has recovered the rent of plaintiff's estate. 2 Starkie's Ev. (6th ed.) 64, and cases cited. So, also, when the defendant has intruded into plaintiff's office and, under color of right, has received the fees. *Ib.*

"But I find no case where, as in the present, the defendant is guilty of no tort, and of no fraud, and claims to act by virtue of a legal right, and that claim is recognized, at least *pro hac vice*, that the party has subsequently been made liable, in assumpsit, as on an implied contract."

Per Dixon, C. J., in *Norden v. Jones*, 33 Wis. 600, at 605: "Judge Redfield, in *Centre Turn Pike Co. v. Smith*, 12 Vt. 217, resolves the cases coming within the narrower rule into four classes, to which the case of *Jones v. Hoar*, 5 Pick. 290, adds a fifth class not named by Judge Redfield."

The right to waive the tort and sue in contract is well summarized by former Chief Justice Jonathan Ross of the Supreme Court of Vermont, in his article on "Assumpsit," 4 Cyc. of Law and Proc. 331.

1. "Plaintiff's right to elect between an action of tort and assumpsit cannot be used when it will deprive defendant of a substantial right or defence. *Isaacs v. Hermann*, 49 Miss. 449; *Finlay v. Bryson*, 84 Mo. 664; *Sedgebeer v. Moore*, Brightly (Pa.), 197.

2. "Where a contractual relation exists between the parties, such as that of agent and principal, attorney and client, or bailee and bailor, a tort arising out of the duty imposed by the relation may be waived, and special assumpsit maintained.

3. "An infant tortiously converting property cannot plead his infancy in bar when sued in assumpsit.

4. "All the authorities agree that, where personal property is tortiously taken and converted into money or money's worth, the owner may waive the tort and sue the wrong-doer in assumpsit for its value. The authorities differ, however, as to the right of the owner to sue in assumpsit where the wrong-doer has not sold or otherwise disposed of the property, but retains it for his own use. One line of decisions denies the right to bring an action of assumpsit in such case." *Jones v. Hoar*, 5 Pick. 285; *Berkshire Glass Co. v. Wolcott*, 2 Allen, 227; *Brown v. Holbrook*, 4 Gray, 102; *Cooper v. Cooper*, 147 Mass. 370; as well as repeatedly affirmed decisions in Alabama, Arkansas, Georgia, Illinois, Kentucky, Maine, Michigan, New Hampshire, New York, North Carolina, Pennsylvania, and Vermont. See Ross, Assumpsit, 4 Cyc. Law and Proc. 334.

*Jones v. Hoar* has been repeatedly reaffirmed in Massachusetts. Thus in *Cooper v.*

The cause of action upon which the count for goods sold was founded was, that the defendant had entered upon the plaintiff's land and cut and carried away a quantity of white oak timber.

Cooper, 147 Mass. 370 [1888], A. went through a form of marriage with X. and lived with him as his wife for many years, performing all the duties of that relation, and after his death learned for the first time that he had a wife living and not divorced from him. A. sought to recover for her services as housekeeper under an implied contract with the intestate. Per W. Allen, J. "The same act or transaction may constitute a cause of action both in contract and in tort, and a party may have an election to pursue either remedy. In that case he may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained. *Jones v. Hoar*, 5 Pick. 285; *Brown v. Holbrook*, 4 Gray, 102; *Ferguson v. Carrington*, 9 B. and C. 59. See, also, Met. Con. 9, 10; 1 Chit. Con. (11 Am. ed.) 87; *Earle v. Coburne*, 139 Mass. 596; *Milford v. Commonwealth*, 144 Mass., 64." *Willett v. Willett*, 3 Watts, 277; *Morrison v. Rogers*, 3 Ill. 317; *McKnight v. Dunlop*, 4 Barb. 36, 42, accord.

But in every case where a plaintiff fails because he has misconceived his action, substantive rights are defeated by procedural technicalities, and injustice is wrought. Hence we may well question whether law productive of habitual injustice is founded on sound theory. That the rule of *Jones v. Hoar* illustrates a case of substantive right defeated by procedural technicality, none will venture to deny.

In *Norden v. Jones*, 33 Wis. 600, the court considered and overturned the doctrine of *Jones v. Hoar*, upon the very ground suggested. Per Dixon, C. J. "The question presented on the rejection of the \$6.00 item is an interesting one, upon which there exists considerable contrariety of opinion and decision, both in England and this country. It was a charge of that sum made by the defendant [in the nature of set-off] against the plaintiff for pasturing the plaintiff's cattle, which the defendant testified the plaintiff had let into his, the defendant's field, by laying down defendant's fence for that purpose. The objection sustained by the justice was, that the laying down of the fence and turning in of the cattle was a trespass on the part of the plaintiff, which could not be brought in or proved as a set-off or cross demand in this form of action [contract] but that the defendant must resort to his action of trespass against the plaintiff to recover the damages which he has sustained. . . .

"The underlying question in all the cases obviously is, When and under what circumstances will the law imply a promise on the part of the defendant to pay? 'It is a principle well settled,' say the court, in *Webster v. Drinkwater*, 5 Greenl. 322, 'that a promise is not implied against or without the consent of the person attempted to be charged by it. And where one is implied, it is because the party intended it should be, or because natural justice plainly requires it, in consideration of some benefit received.' Tested by the latter as the governing principle, upon which the law raises a promise to pay, it is very obvious that the more liberal rule is the correct one, and that which should prevail. . . . Apart from all reasoning of a technical or artificial character, and looking to the substantial ends of justice, it is quite difficult to see why this principle should not be applied in cases like *Jones v. Hoar*, and *Willett v. Willett*, *supra*. In neither could the defendant have been prejudiced by allowing the plaintiff to sue in assumpsit; on the contrary, the practice generally operates to favor the defendant, as the plaintiff thereby foregoes his right to damages for the tort as such, and restricts himself to the simple value of the property." Judgment reversed.

California, Kansas, Mississippi, Missouri, Montana, North Dakota, Oregon, and Tennessee accord with Wisconsin in overturning the doctrine of *Jones v. Hoar*. See *Ross*, Assumpsit, 4 Cyc. Law and Proc. 334. Perhaps we can do no better than to close with the words of Tindal, C. J., in *Young v. Marshall*, 8 Bing. 43: "No party is bound to sue in tort, where, by converting the action into an action of contract, he does not prejudice the defendant." This, we believe, is the better rule.



And the question was argued (in writing) whether the plaintiff could waive the tort and sue in assumpsit, it not appearing that the timber had been sold by the defendant. Nothing was said in the argument, nor at the trial in the court below, of the effect of bringing money into court in the manner above mentioned.

At October Term, 1826, the court observed, that by the statement of facts they were to decide upon the legal effect of bringing money into court under the rule in this case; and they suggested whether it was not an admission of all the contracts set forth in the declaration.

The counsel for the defendant then said, that it was not so considered in this county; that the money in the present case was intended to be applied to the promissory note; that the whole controversy respected the timber; but if it was necessary to specify the counts on which the money was brought in, he would move for leave to amend the rule. *Stoveld v. Brewin*, 2 B. & A. 116; *Mellish v. Allnutt*, 2 M. & S. 106; *Muller v. Hartshorne*, 3 B. & P. 556.

The opposite counsel referred to 3 Stark. Ev. 1397, cites 3 Taunt. 95, and Peake's Cas. 15.

*Per curiam.* It is clear, both from authority and upon principle, that the defendant should have specified on what count he brought in the money. But under the circumstances of this case he may be entitled to relief.

The opinion of the court was delivered, at this term, by

Parker, C. J. The plaintiff declares in assumpsit, and one count is for goods sold and delivered. By the agreement it appears, that the only ground for supporting this count is, that the defendant cut and took away certain trees from land claimed by the plaintiff, and for the purpose of the argument, actually owned by him. The proper action would undoubtedly be trespass for the injury to the land, or trover for the trees. But the plaintiff contends that he has a right to waive the tort, and charge the defendant with the trees as sold to him. Upon examination of the authorities cited, which are well summed up and commented upon by Strong, J., in the opinion of the Court of Common Pleas, we are satisfied that the plaintiff cannot maintain this position. There is no contract express or implied between the parties, and therefore an action *ex contractu* will not lie. The whole extent of the doctrine, as gathered from the books, seems to be, that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrong-doer sell the goods and receive the money, waive the tort, affirm the sale, and

have an action for money had and received for the proceeds. No case can be shown where assumpsit as for goods sold lay in such case, except it be against the executor of the wrong-doer, the tort being extinguished by the death, and no other remedy but assumpsit against the executor remaining. Such was the case of *Hambly v. Trott*, referred to in Judge Strong's opinion.

But the defendant paid money into court, under a rule, and did not distinguish as to which of the counts the payment was applicable. And this, by the authorities, is an admission of the contract as set forth in the declaration. *Bennett v. Francis*, 2 B. & P. 550. It is, however, considered as within the discretion of the court to apply this rule or not, as equity shall require; for it may happen that by mere inadvertency, where there are several counts, a general tender is made, when it is intended only to be made to one or more, but not to all the counts. In the case before us there is a count upon a promissory note, and we have been satisfied that it was meant that the money paid should be applied to that count only, a litigation in regard to the price claimed for trees, and the right of action in relation to them, being always intended. So it was considered by the Court of Common Pleas, who gave judgment without any reference whatever to the tender, their attention not having been called to it by the counsel. We think therefore the defendant ought to be relieved from the effect of an admission which is the technical result of bringing money into court in the form used in this case. Leave is granted to amend the rule.

Mills, Ashmun, and Miles, for the plaintiff.

Bigelow, for the defendant.

In these few chapters, we have traced the origin and evolution of the several personal actions. We have observed, by inference rather than by direct statement, that the substantive law of England was remorselessly fettered by iron strong rules of procedure. In the beginning, when the Statute of Westminster II. became law, a liberal interpretation would have resulted in an approximately just system for the protection of rights, without any separate tribunal of equity. The Chancery clerks framed liberal writs, in the broad spirit of the Roman law, but the common-law judges crushed them. A man might have a right, but it was useless to him unless he had a remedy to vindicate it. For a time it seemed that the intolerable situation was

growing hopeful. Lord Holt's famous sentiment in *Ashby v. White*, "Where there is a right there is a remedy to enforce that right;" Lord Mansfield's words in *Bird v. Randall*, "An action on the case is in the nature of a bill in equity, and in effect is so," — certainly gave promise of a bursting of the fetters. But the liberal view did not, as we have seen, prevail. Lord Holt was a narrow man, but a great lawyer; Lord Mansfield was a broad man and a great lawyer; both were sufficiently developed jurists to realize the injustice of the unyielding forms which were the characteristic feature of the law they expounded; both sought to right the wrong; both failed.

The reason for this failure is not hard to find. It was the unyielding system of procedure. Equity courts and common-law courts each had their respective jurisdictions, though the boundary line between them was thrust now this way, now that, in a battle of intellects for the acquisition of the neutral ground. Each had its peculiar processes for defeating the other. Where a plaintiff had a complete, adequate remedy at law, he must keep out of equity. But where a defendant, successfully proceeded against in a court of law, could search out for himself requisite equitable relief, the equity court would enjoin the victorious plaintiff from the fruits of his victory. It followed, then, that an action on the case was not, "in effect, a bill in equity." Had the words of Lord Mansfield become settled law, the jurisdiction of courts of equity and courts of law would have become concurrent, and many anomalies have been averted. As it was, the distinction between law and equity was preserved; and this through the procedure by which the substantive wrong in each was redressed.

## CHAPTER IV.

### TRIALS.

NOWHERE, so much as in the more ancient modes of trial, do we find the *real* reason for the inadequacy of common-law relief. What the ancient forms of trials were; what specific forms of trials prevailed in and were peculiar to the several actions; and what injustice these forms wrought, — may be seen in the following pages. A study of these ancient modes of trial can hardly fail to impress the student with the extent to which ancient procedure has dwarfed our modern law, and warped not only the modern legal, but the modern social and financial, world as well.

### OLDER MODES OF TRIALS AT THE COMMON LAW.

#### TRIAL BY ORDEALS AND OATHS.

##### 1. *Ordeals.*

First, of ordeals. "The old modes of proof might be reduced to two, ordeals and oaths; both were appeals to the supernatural. The history of ordeals is a long chapter in the history of mankind; we must not attempt to tell it. Men of many, if not all races, have carried the red-hot iron or performed some similar feat in proof of their innocence. In Western Europe, after the barbarian invasions, the Church had adopted and consecrated certain of the ordeals and had composed rituals for them. Among our own forefathers the two most fashionable methods of obtaining a *iudicium Dei* were that which adjured a pool of water to receive the innocent and that which regarded a burnt hand as proof of guilt. Such evidence as we have seems to show that the ordeal of hot iron was so arranged as to give the accused a considerable chance of escape. In the England of the twelfth century both of the tests that we have mentioned were being freely used; but men were beginning to mistrust them. Rufus had gibed at them. Henry II. had declared [and in the note appended the writer quotes his words] that

when an indicted man came clean from the water, he was none the less to abjure the realm, if his repute among his neighbors was of the worst.<sup>1</sup>

"Then came a sudden change. The Lateran Council of 1215 forbade the clergy to take part in the ceremony. Some wise churchmen had long protested against it, but perhaps the conflict with flagrant heresy and the consequent exacerbation of ecclesiastical law had something to do with its suppression. In England this decree found a prompt obedience such as it hardly found elsewhere; the ordeal was abolished at once and forever. Flourishing in the last records of John's reign, we cannot find it in any later rolls. Our criminal procedure was deprived of its handiest weapon; but to this catastrophe we must return hereafter." 2 Pollock and Maitland, 596.

## 2. Oaths.

Second, of oaths. "It is called wager of law, because of ancient time he put in surety to make his law at such a day; and it is called making of his law, because the law doth give such a special benefit to the defendant, to bar the plaintiff forever in that case." Co. Litt. 294 *b*, 295 *a*; 3 Blackstone's Commentaries, 341; confer Stephen on Pleading, Andrew's first edition, 481.

"The substance of the plaintiff's claim as set forth in the writ of debt is that the defendant owes him so much and wrongfully withholds it. It does not matter, for a claim framed like that, how the duty arises. It is not confined to contract. It is satisfied if there is a duty to pay on any ground. It states a mere conclusion of law, not the facts upon which that conclusion is based, and from which the liability arises. The old German complaint was, in like manner, 'A. owes me so much.'

"It was characteristic of the German procedure that the defendant could meet the complaint by answering, in an equally general form, that he did not owe the plaintiff. The plaintiff had to do more than simply allege a debt, if he would prevent the defendant from escaping in that way. In England, if the plaintiff had not something to show for his debt, the defendant's denial turned him out of court; and even if he had, he was liable to be defeated by the defendant's swearing with some of his friends to back him that he

<sup>1</sup> "Et qui invenietur per sacramentum prædictorum rettatus vel publicatus quod fuerit robator vel murrator vel latro vel receptor eorum, postquam dominus rex fuit rex, capiatur et est, ad jirisam aque, et jure quod ipse non fuit robator vel murrator vel latro vel receptor eorum postquam dominus rex fuit rex, de valentia v. solidorum quod sciat." Assize of Clarendon, 2; Stubbs, Select Charters, 143.

owed nothing. The chief reason why debt was supplanted for centuries by a later remedy, *assumpsit*, was the survival of this relic of early days." Holmes, *Common Law*, 252.

# KING v. WILLIAMS.

IN THE KING'S BENCH. 1824.

REPORTED 2 BARNEWALL AND CRESSWELL, 538.

In 1824, trial by wager of law still existed in England.

Debt on a simple contract. Defendant pleaded *nil debet per legem*; and the master having appointed a day for the defendant to come into court with his compurgators,

Langslow applied to the court to assign the number of compurgators, with whom the defendant should come to perfect his law. The books leave it doubtful whether six or eleven are necessary. In *Les Terms de la Ley*, p. 442 (which book is ascribed to Rastall, by the preface to 10 Co., and is there mentioned as a work of high estimation), is this passage: "Mes quant un gagera son ley, il amesnera ovesque lui, 6, 8, or 12 de ses vicines come le court lui assignera de jurer ovesque lui." [Bayley, J. Is it not said in Blackstone's Com. that eleven are necessary? <sup>1</sup>] It is, but his opinion is founded on Co. Lit. 295, and 2 Inst. 45, and the authorities there cited, viz. Fleta, b. 2, c. 63, and 33 Hen. VI. 8, do not support the position. In Fleta it is stated, that the number of compurgators shall depend upon the number of the *secta*, produced by the plaintiff; that is to say, if the *secta* consist of two, the compurgators shall be four, and so on, the compurgators being double the number of the *secta*, until the *secta* shall amount to six, when it will not be necessary for the compurgators to double their number, but eleven will be sufficient; and the assertion in the Year Book before mentioned, that the tenant shall make his law *de duodecimo manu*, that is to say, eleven by himself, is merely by counsel in argument. In an anonymous case in 2 Ventr. [171] it is stated that less than eleven compurgators will do. In Styles' Practical Register, p. 572, it is said of wager of law, "He that is to do it, must do it *duodeno manu*, viz. he must bring six compurgators with him, the defendant then swears *de fidelitate*, the compurgators *de credulitate*." This species of defence is not often heard of now, but in *Barry v. Robinson* [1 New Reports, 191] the court denied that a wager of law would now be disallowed.

Abbott, C. J. The court will not give the defendant any assistance

<sup>1</sup> Vol. III. 343.

in this matter. He must bring such number of compurgators as he shall be advised are sufficient. If the plaintiff is not satisfied with the number brought, the objection will be open to him, and then the court will hear both sides. Rule refused.

The defendant prepared to bring eleven compurgators, but the plaintiff abandoned the action.<sup>1</sup>

### 3 AND 4 GULIELMI IV.

#### CAP. XLII.

An act for the further amendment of the law, and the better advancement of justice. [14 August, 1833.]

XIII. And be it further enacted, that no wager of law shall be hereafter allowed.

#### TRIAL BY BATTLE.

#### ASHFORD *v.* THORNTON.

IN THE KING'S BENCH. 1818.

REPORTED 1 BARNEWALL AND ALDERSON, 405.

[The case as here reported is greatly abridged. The full report may be examined by the reader with profit. But the importance of the case, as illustrating a limitation which procedure was imposing upon substantive law well into the nineteenth century, will plainly appear here.]

Trial by battle might, by the late common law, be waged by the appellee in an appeal of death, in the absence of undeniable proof of his guilt.

In the King's Bench Michaelmas Term, 58 G. 3, Abraham Thornton was attached to answer W. Ashford, who was the eldest brother and is the heir of Mary Ashford deceased, of the death of the said Mary Ashford, and thereupon the said W. Ashford in his own proper person appealeth Abraham Thornton, etc. For that he the said Abraham Thornton not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on the 27th day of May, in the 57th year of the reign of our sovereign lord George the Third, by the grace of God, etc., with force and arms at the parish of Sutton Coldfield in the county of War-

<sup>1</sup> The above case is an example of the injustice wrought by common-law procedure upon substantive rights.

wick, in and upon the said Mary Ashford, spinster, in the peace of God and our said lord the king, then and there, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Abraham Thornton then and there feloniously and wilfully, and of his malice aforethought, did take the said Mary Ashford into both his hands, and did then and there feloniously, wilfully, violently, and of his malice aforethought, cast, throw, and push the said Mary Ashford into a certain pit of water, wherein there was then a great quantity of water, situated in the parish of Sutton Coldfield aforesaid in the county aforesaid, by means of which said casting, throwing, and pushing of the said Mary Ashford into the pit of water aforesaid by the said A. Thornton in form aforesaid, she, the said M. Ashford, in the pit of water aforesaid with the water aforesaid, was then and there choked, suffocated, and drowned, of which said choking, suffocating, and drowning she, the said M. Ashford, then and there instantly died. And so the said A. Thornton her the said Mary Ashford in form aforesaid feloniously and wilfully, and of his malice aforethought, did kill and murder against the peace of our said lord the king his crown and dignity. And if the said A. Thornton will deny the felony and murder aforesaid, as aforesaid charged upon him, then the said W. Ashford, who was the eldest brother and is the heir of the said Mary Ashford deceased, is ready to prove the said felony and murder against him the said A. Thornton according as the court here shall consider thereof, and hath found pledges to prosecute his appeal.

Witness WILLIAM ASHFORD,  
his × mark.

Clarke then moved that the appellee be required to plead.

Reader, who with Reynolds and Tindal appeared for the appellee, applied for time. The court by consent granted time till Monday, Nov. 16.

Reader then applied for copies of the original writ, the return thereto, and the count, which the court refused, but desired Mr. Barlow to read over the two former, and Mr. Leblanc to read over the latter, slowly in court, which was done.

Nov. 16. The appellee being brought into court and placed at the bar, and the appellant being also in court, the count was again read over to him, and he was called upon to plead. He pleaded as follows: "Not guilty; and I am ready to defend the same by my body." And thereupon taking his glove off, he threw it upon the floor of the court.

Clarke then applied to the court for time.



Lord Ellenborough. Do you apply for time generally, or for time to counterplead?

Clarke stated that he applied for time to counterplead.

The court then gave time till Saturday, Nov. 21, to counterplead; Reader for the appellee consenting to it.

Nov. 21. The parties appearing, the defendant delivered in his counterplea, which he verified by his affidavit, and the same was read by Mr. Leblanc.

[The counterplea set forth strong circumstantial evidence pointing to the guilt of the appellee. To this there was a general demurrer and joinder therein.]

Abbott, J. I am of the same opinion, that this counterplea is not sufficient to oust the appellee of his wager of battel. The appeal seems to have been in its origin a challenge, and the party accused was allowed to wage his battel, unless in certain excepted cases: as, for instance, where the appellant was an infant, or maimed, or above sixty years of age, or a woman; and perhaps it was for this amongst other reasons that a woman was allowed to appeal only in one case, namely, that of the death of her husband. So in the case of an approver, if the person claiming to be so was a woman, an infant, maimed, or above sixty, he was not allowed to be an approver, and for this reason, that in such cases the defendant would lose his wager of battel. 2 Hales P. C. 233. This shows the nature of this proceeding, as being in its origin a challenge, and that the battel was the right of the appellee at his election, unless certain exceptions existed. Then has this appellant brought himself within any of those exceptions which entitle him to decline the wager of battel? It is said that he has done so by pleading a violent presumption of guilt against the appellee. Now, as to this the rule is to be found in Bracton. The presumption must be strong and vehement, so as not to admit of denial, or proof to the contrary. It must be strong, vehement, and incapable of contradiction that the court might be warranted in ordering execution thereon. It is not necessary to consider whether the instances of the rule put by Bracton are or are not of this description. I think they are not. But at the time when Bracton wrote they were so considered, and it was on that ground that they were put as instances of the rule. If, therefore, there were no insufficiency in the mode of averring the facts stated in the counterplea, and if all the circumstances there stated were well pleaded, still I should be of opinion that they did not amount to a presumption of the kind mentioned by Bracton, namely, one so strong and vehement as to be incapable of contradiction. The defendant is therefore entitled to this his law-

ful mode of trial. What the consequences of deciding that this counterplea is insufficient may be, the court will, if necessary, take further time to consider.

Lord Ellenborough, C. J. The general law of the land is in favor of wager of battel, and it is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejudices may therefore exist against this mode of trial, still, as it is the law of the land, the court must pronounce judgment for it.

Gurney then, on the part of the appellant, prayed time for a day or two to consider whether the appellant would wish to have any further argument on the point about which the court entertained doubts; which was granted.

Lord Ellenborough, C. J. Let there be entered on the record *curia advisare vult*.

And now [Monday, April 20th] Gurney appeared for the appellant, and stated that he prayed no further judgment. Whereupon, by consent of both parties, the court ordered that judgment be stayed on the appeal and that the appellee be discharged. The proceedings were then handed over to the crown side of the court, and Thornton was immediately arraigned by Mr. Barlow on the appeal, at the suit of the king, to which he pleaded *instanter*, *autre fois acquit*.

The Attorney-General then, being present in court, confessed the plea to be true. Whereupon the court gave judgment that the appellee should go thereof without day. The appellee was immediately discharged.<sup>1</sup>

#### STATUTE 59 GEORGE III. CHAPTER 46. ANNO 1819.

##### CAP. XLVI.

An act to abolish appeals of murder, treason, felony, or other offences, and wager of battel, or joining issue and trial by battel, in writs of right. [22d June, 1819.]

“Whereas appeals of murder, treason, felony, and other offences, and the manner of proceeding therein, have been found to be oppressive, and the trial by battel in any suit, is a mode of trial unfit to be used; and it is expedient that the same should be wholly abolished;’ be it therefore enacted by the king’s most excellent

<sup>1</sup> Well might Lord Hale have had in mind such a case as this when he spoke out against the procedure of his day, “More offenders escape by the over-easy ear given to exceptions in indictments than by their own innocence, and many heinous and crying offences escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villainy and the dishonor of God.” 2 Pleas of the Crown, 193.

majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, all appeals of treason, murder, felony, or other offences, shall cease, determine, and become void; and that it shall not be lawful for any person or persons, at any time after the passing of this act, to commence, take, or sue appeal of treason, murder, felony, or other offence, against any other person or persons whomsoever, but that all such appeals shall, from henceforth, be utterly abolished; any law, statute, or usage to the contrary in any wise notwithstanding.

“II. And be it further enacted, that from and after the passing of this act, in any writ of right now depending, or which may hereafter be brought, instituted, or commenced, the tenant shall not be received to wage battel, nor shall issue be joined nor trial be had by battel in any writ of right, any law, custom, or usage to the contrary notwithstanding.”

“Before the accession of Edward I. the judicial combat was already confined to that sphere over which its ghost reigned until 1819. The prosecutor in the appeal of felony, the demandant in the writ of right, offered battle, the one by his own, the other by his champion's body, and the defendant might accept the offer, though by this time he could, if he pleased, have recourse to a verdict of his neighbors, instead of staking his cause on a combat. Even in the Norman days ‘battle did not lie’ if there was no charge of crime and less than ten shillings’ worth of property was in dispute. As a means of proving debts and ‘levying’ would-be swearers from the oath, it disappeared soon after Glanvill's day. That the oath of the demandant's witness and champion was almost always false, was notorious, though we have met with a man who at the last moment refused to take it. Does this induce our legislators to abolish the battle? No, it induces them to abolish the material words in the oath that made the champion a witness. We see one hireling losing his foot for entering into warranty in an *actio furti*; but for civil causes professional pugilists were shamelessly employed. Apparently there were men who let out champions for hire. Richard of Newnham, whose services were highly valued about the year 1220, might be retained through his ‘master,’ William of Cookham. We doubt whether in Bracton's day the annual average of battles exceeded twenty. There was much talk of fighting, but it generally came to nothing. The commonest cause for fighting was the appeal of an ‘approver’ (probator), that is, of a convicted criminal who

had obtained a pardon conditional on his ridding the world of some half-dozen of his associates by his appeals. Decent people, however, who were in frankpledge and would put themselves upon a jury, were not compelled to answer his accusations.

"The rules of the duel have been so well described by others that we shall say little of them. The combatants' arms of offence are described as *baculi cornuti*, *bastouns cornuz*. It has been commonly assumed that this means staffs 'tipped with horn;' but Dr. Brunner has lately argued that the weapon thus described was really the old national weapon of the Franks, the war-axe (*francisca*, *bipennis*), which in its day had conquered Gaul. The burden of proof was on the combatant who fought for an affirmative proposition; his adversary won if the stars appeared before the fight was over." 2 Pollock and Maitland, 630.

REPORTED Y. B. 31-32 EDW. I. 317. ANNO 1304.<sup>1</sup>

In trespass de bonis asportatis, no trial by battle.

Robert le Conestable and Lucy, his wife, and others named in the writ, some of whom came and some of whom did not come, were attached to answer William le Latimer, the younger, why with force and arms on a certain day in a certain year in such a vill they ravished and took away Margery, the wife of the said William, together with his goods and his chattels found there, viz. rings and buckles of gold and cups of silver to the value of, etc., against the enactments of our lord the king and his statute, to his damage, etc.

And then said Sir Robert le Conestable that if the court would allow, he was ready to affirm by his body as became a knight that he was not guilty; and he threw down his glove to the court. And William le Latimer offered in like manner to prove the affirmative. And the justices refused that issue, because they had no warrant to receive such an issue. And then said Herle, as to Robert and the others named who are here, except Lucy, the wife of Robert, not guilty, ready, etc.: and as to Lucy, judgment of the writ; for a woman cannot ravish another woman; judgment if this writ lie against her. Howard. Although she could not ravish her, she could assent to it; therefore answer over. Herle. She answers you that she is not guilty; ready, etc. And the other side said the contrary.

#### TRIAL BY RECORD.

"Trial by record was used to determine the existence of facts alleged to have happened in court. The records of the superior

<sup>1</sup> A part of the case is omitted.

courts, whether proved orally or by inspection, were indisputable ; those of the inferior courts could be impeached." Harriman, Contracts, 373.

#### TRIAL BY CHARTER.

"In the case of trial by charter, the charter was produced at the trial. If it appeared to be genuine, the party who executed it was held to be bound by his solemn act or deed, and all statements and promises therein contained were binding on him in favor of the other party to the deed. The Saxon method of executing a deed was for the party to subscribe his name if he could, and in any case to affix the sign of the cross. Seals were sometimes used, but were not essential to the validity of the deed. The Normans were more accustomed to the use of seals, and after the Norman Conquest the seal came to be essential to the validity of the deed ; but so late as the reign of Henry II. we have strong evidence that the use of seals was common only among great men. Centuries later, in *Pillans v. Van Mierop*, one of the greatest of English judges held a promise in writing to be binding without a seal ; but his decision proved of little consequence, as it was soon overruled by the House of Lords.

"When the charter was produced in court, the judge determined its genuineness by comparison of the seal with other seals of the same party, if possible ; otherwise, the party producing the charter might prove the seal by means of the duel. When it was once established that the seal was the defendant's, he was held bound by the deed, although the seal had been affixed without his consent ; but if he had lost his seal he was not responsible for its use ; provided he had given public notice of its loss. The evidence afforded by the deed could only be contradicted or overcome by other evidence of an equally satisfactory character. Oral testimony was inadmissible to impeach or to modify the effect of a deed when the genuineness of that deed was once established, — a rule which still prevails in common-law courts." Harriman, Contracts [2d ed.], 373.

#### TRIAL BY JURY.

"That in old times the 'jurors were the witnesses' — this doctrine has in our own days become a commonplace. For the purposes of a popular exposition it is true enough. Nevertheless it does not quite hit the truth. If once the jurors had been called *testes*, if once their *veredictum* had been brought under the rubric *testimonium*, the whole subsequent history of the jury would have been changed, and

never by imperceptible degrees would the jurors have ceased to be 'witnesses' and become judges of fact. In all probability a time would have come when the justices would have begun to treat these *testes* in the manner in which witnesses ought to be treated according to our ideas; each witness would have been separated from his fellows and questioned as to his belief and its grounds. The court, instead of receiving the single verdict of a jury, would have set itself to discuss the divergent testimony of twelve jurors. Where there was a flat contradiction it might have been puzzled; still the simple device of counting heads was open to it, and in all events it might have insisted that each juror whose testimony was received should possess a first-hand knowledge of the facts about which he spoke, for already the elementary truth that 'hearsay' is untrustworthy had been apprehended.<sup>1</sup> Therefore we have to explain why the history of the jury took a turn which made our jurors, not witnesses, but judges of fact, and the requisite explanation we may find in three ancient elements which are present in trial by jury so soon as that trial becomes a well-established institution. For want of better names, we may call them (1) the arbitral, (2) the communal, and (3) the *quasi*-judicial elements.

"(1) Jurors are not arbitrators. We have seen, however, that the verdict of jurors becomes a common mode of proof only because litigants 'put themselves' upon it, and that the summons of a jury (in the narrow sense of that term which opposes *iurata* to *assisa*) is always in theory the outcome of consent and submission. Both litigants have agreed to be bound by a verdict of the country. They might perhaps have chosen some other test. We may, for example, see a plaintiff and a defendant 'putting themselves' upon the two witnesses named in a charter, or upon the word of some one man. Now in such a case neither of the litigants can quarrel with the declaration that he has invoked. He has called for it and must accept it. So with the verdict of the country; he has asked for it, and by it he must stand or fall. It is, says Bracton, 'his own proof,' and therefore he cannot reprobate it. If he produced as compurgators men who at the last moment refused to help him in his oath, he could not demand from them an explanation of their conduct. So with the jurors; it is not for him to ask them questions or expose their ignorance, for he has put himself upon their oath. What he cannot do for himself the court will not do for him. The justices are not tempted to analyze the process of

<sup>1</sup> See, e. g. *Select Pleas of the Crown*, pl. 29 [A. D. 1202]; "Et hoc offert probare . . . sicut ille qui non vidit hoc sed per alios habet eum suspectum. Nullum est appellum."

which an unanimous verdict is the outcome ; that verdict has been accepted in advance by the only persons whom it will affect.

"(2) The verdict of the jurors is not just the verdict of twelve men ; it is the verdict of a *pays*, a 'country,' a neighborhood, a community. There is here a volatile element which we cannot easily precipitate, for the thoughts of this age about the nature of communities are vague thoughts, and we cannot say 'the country' is definitely *persona ficta*. Still we may perceive what we cannot handle, and, especially in criminal procedure, the voice of the twelve men is deemed to be the voice of the country-side, often the voice of some hundred or other district which is more than a district, which is a community. The justices seem to feel that if they analyzed the verdict they would miss the very thing for which they are looking, the opinion of the country.

"(3) Lastly, we may already detect in the verdict of the jurors an element which we cannot but call *quasi-judicial*. Whatever theory may have prevailed, the parties to an action are very soon submitting to 'the country' questions which the twelve representatives of the country will certainly not be able to answer if they speak only of what they have seen with their own eyes. Some of the verdicts that are given must be founded upon hearsay and floating tradition. Indeed, it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony ; they must weigh it and state the net result in a verdict. Bracton sees that this is so ; he even, though in a loose, untechnical sense, speaks of the jurors as deliberating and 'judging,' and he speaks of the result of their deliberations, when it takes the form of a general verdict, as a 'judgment.'

"It is to the presence of these three elements that we may ascribe the ultimate victory of that principle of our law which requires an unanimous verdict. . . .

"The victory is not complete until the fourteenth century is no longer young ; but, from the moment when our records begin, we seem to see a strong desire for unanimity. In a thousand cases the jury is put before us as speaking with a single voice, while any traces of dissent or of a nescience confessed by some only of the jurors are very rare. 'You shall tell us,' says a judge in 1293, 'in other fashion how is next heir, or you shall remain shut up without meat or drink until the morrow.'"<sup>1</sup> 2 Pollock and Maitland, 620.

<sup>1</sup> Y.B. 21-22 Edw. I. p. 273.

## CHAPTER V.

### CODES AND PRACTICE ACTS.

#### (a) *Codes — Their Relation to the Common Law.*

THE Code of Civil Procedure of the State of New York may be referred to as typical.

##### 1. *Actions.*

“The Code of New York, as originally adopted, declared, ‘the distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.’ With slight verbal changes the above provision has been enacted in most of the States and Territories which have adopted the reformed procedure.” Bryant, Code Pl. 106.

“The different forms of actions at law are no longer known. There is no inquiry whether the action is covenant or assumpsit, trespass, trover, or case. Disencumbered of all arbitrary forms of classification, the action is instituted by the service of the summons. The complaint or petition states the cause of action.” Bryant, Code Pl. 107.

The summons, then, is roughly analogous to the original writ of the common law; the complaint or petition, to the declaration.

#### GOULET *v.* ASSELER *et al.*

COURT OF APPEALS, NEW YORK. 1860.

REPORTED 22 NEW YORK, 225.

The fundamental elements of the several actions at the common law are not abolished by the codes.

Appeal from the Superior Court of the City of New York. Action for taking, selling, and converting to the defendant's use a quantity of wines, liquors, cigars, and bar furniture, the stock and



utensils of a restaurant. The plaintiff made title under a chattel mortgage executed to him by M. Caussidiere and E. Bonnier ; and the defendant justified under a judgment and execution against the mortgagors, in which judgment they were the plaintiff's, the execution being levied on the property by their direction. The mortgage was dated March 19, 1855, and purported to be for the security of \$1200, payable in one year from that date. It contained the following clause : " And until default be made in the payment of the said sum of money, we [the mortgagors] are to remain and continue in the quiet and peaceable possession of said goods and chattels, and in the full and free enjoyment of the same." The principal part of the property, in value, was wines, liquors, and cigars. The defendants were prosecuting their action when the mortgage was executed, and obtained judgment shortly afterward. The officer sold the goods on the execution on the 27th April, 1855. The sale was in different parcels, and the goods were delivered by the officer to the respective purchasers, and the proceeds were paid to the defendants. No mention was made of the mortgage at the sale, though the defendants had been informed of it after the levy and before the sale took place. It did not appear that the defendants purchased any of the goods at the sale. The action was commenced after the debt mentioned in the mortgage became payable ; and the plaintiff had, after that time and before bringing the suit, demanded the goods of the defendants. The character of the complaint and of the evidence sufficiently appears from the following opinion.

The defendants, on the trial, insisted that the goods were subject to levy on execution against the mortgagors, and that the action could not be sustained. The jury were instructed to assess the value of the goods and to give their verdict for the plaintiff to that value, subject to the opinion of the court, with power to dismiss the complaint. The value was fixed by the jury at \$850, and the court at general term gave judgment for the plaintiff for that amount. The defendants appealed. The case was submitted without oral argument, on printed briefs.

John Sessions, for the appellants.

John Cook, for the respondent.

Selden, J. If the plaintiff has any legal remedy for the injury of which he complains, it is clear that that remedy has not been properly pursued in the present case, and that the judgment therein cannot be sustained consistently with the well-established principles of the common law, and the repeated decisions of this court. The difficulty in the case, and the error of the court below, will be most

readily seen and appreciated by referring to some of the distinctions between those forms of action which the Code has abolished. It can hardly be claimed that, prior to the Code, an action of trespass or trover could have been maintained, either against the officer or the plaintiff in the execution, under the circumstances here disclosed. The case would have fallen directly within the principles of the case of *Gordon v. Harper*, 7 Term Reports, 9, and the subsequent cases of that class which have never been departed from either in England or in this country. If any action would have lain before the Code, it could only have been an action founded upon the special circumstances of the case, setting forth the injury to the contingent interest of the plaintiff in the property, and claiming damages for such injury.

While, however, in such an action, the plaintiff would have avoided the effect of the technical rule that, in order to recover in trespass or trover, he must show that he had either the actual possession or the right of the possession at the time of the alleged taking or conversion, he also, supposing that the action could have been maintained, would have imposed upon himself the necessity of proving, specifically, the damages which he had sustained. In trespass and trover, before the Code, the plaintiff recovered, if at all, upon the ground that he was the owner of the property in controversy. The measure of damages, therefore, in all such cases, was the value of the property taken or converted. Although it appeared that the plaintiff held the title as mere security for a debt, and that his debtor was abundantly able to pay, so that his actual loss was nothing, his recovery, in cases where he recovered at all, was nevertheless for the full value of the property, provided that did not exceed the amount of his lien. In a special action on the case, on the contrary, the plaintiff could, under no circumstances, recover more than the damages shown to have been actually sustained. He must prove to what extent his security was impaired, by showing whether the debtor was or was not responsible, and whether or not it was still in his power to follow and enforce his lien against the property.

Although the Code has abolished all distinction between the mere forms of action, and every action is now in form a special action on the case, yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish. It is impossible to make an action for a direct aggression upon the plaintiff's rights by taking and disposing of his property the same thing, in substance or in principle, as an action to recover for the consequential injury resulting from an improper interference with

the property of another, in which he has a contingent or prospective interest. The mere formal differences between such actions are abolished. The substantial differences remain as before. The same proof, therefore, is required in each of these two kinds of actions as before the Code, and the same rule of damages applies. Hence, in an action in which the plaintiff establishes a right to recover, upon the ground that the defendant has wrongfully converted property to the possession of which the plaintiff was entitled at the time of the conversion, the proper measure of damages still is, the value of the property; while in an action in which the plaintiff recovers, if at all, upon the ground that the defendant has so conducted himself in the exercise of a legal right in respect to another's property, as unnecessarily and improperly to reduce the value of a lien, which the plaintiff could only enforce at some subsequent day, the damages must, of course, depend upon the extent to which that lien has been impaired.

If we apply these principles to the présent casé, the error in the judgment under review becomes apparent. The complaint is, in substance, the same as a declaration in trover, under the former system of pleading. . . . The proof could, at most, only authorize the plaintiff to recover the consequential damages resulting to the contingent interest under the mortgage; while the damages were assessed and the judgment rendered upon the assumption that he was the owner of the property and entitled to the immediate possession. . . . The judgment must be reversed, and there must be a new trial, with costs to abide the event.

All the judges were for reversal upon the preceding opinion<sup>1</sup> except Comstock, Ch. J., and Denio, J. [the latter of whom gave a dissenting opinion].

## 2. *The Summons.*

"A civil action is commenced by the service of a summons." Code Proc. s. 127.

"The summons must contain the title of the action, specifying the court in which the action is brought, the names of the parties to the action, and, if it is brought in the Supreme Court, the name of the county in which the plaintiff desires the trial; and it must be subscribed by the plaintiff's attorney, who must add to his signature his post-office address, specifying a place in the State where there is a post-office. If in a city, he must add the street, and

<sup>1</sup> Eldridge v. Adams, 54 Barb. 417 (1866); Miller v. Van Tassell, 24 Cal. 459 (1864); Murphy v. Estes, 6 Bush (1869); Hill v. Barrett, 14 B. Monroe (1853), acc. Cf. Trustees of School Section Sixteen v. Odlin, 8 Ohio St. 293 (1858).

street number, if any, or other suitable designation of the particular locality." Code Proc. s. 128; Am. L. 1877, c. 416; L. 1879, c. 542.

### 3. *The Form of the Summons.*

"The summons, exclusive of the title of the action and the subscription, must be substantially in the following form, the blanks being properly filled:

"To the above named defendant: You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure<sup>1</sup> to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint. Dated \_\_\_\_\_."

The summons is deemed the mandate of the court. See Code Proc. s. 129, Am. L. 1877, c. 416.

### 4. *The Service of the Summons.*

"The summons may be served by any person, other than a party to the action, except where it is otherwise specially prescribed by law. The plaintiff's attorney may, by an indorsement on the summons, fix a time within which the service thereof must be made; in that case, the service cannot be made afterwards. Where a summons is delivered for service to the sheriff of the county, wherein the defendant is found, the sheriff must serve it, and return it, with proof of service, to the plaintiff's attorney, with reasonable diligence." Code Proc. s. 133. See rule 18.

### (b) *Practice Acts — Their Relation to the Common Law.*

The Practice Act of Massachusetts, drawn in its final form by Hon. Benjamin R. Curtis, later one of the justices of the Supreme Court of the United States, may be referred to as typical.

#### 1. *Actions.*

"There shall be only three divisions of personal actions: —

"First, Contract, which shall include actions formerly known as assumpsit, covenant, and debt, except actions for penalties.

<sup>1</sup> So in the original.

“Second, Tort, which shall include actions formerly known as trespass, trespass on the case, trover, and actions for penalties.

“Third, Replevin.” Revised Laws, Massachusetts, c. 173, s. 1.

## 2. *The Original Writ.*

“Actions at law, unless founded on *scire facias* or other special writs, or unless otherwise authorized by statute or by established practice, shall be commenced by original writs. Such writs shall be signed, sealed, and bear teste as required by the constitution, and shall be framed either to summon the defendant, with or without an order to attach his goods or estate, or to attach his goods or estate and, for want thereof, to take his body; or, in an action commenced by the trustee process, to attach his goods or estate in his own hands, and also in the hands of the trustee. Original writs shall be in the form heretofore established by law and by the usage and practice of the courts. If changes in their form are necessary to adapt them to changes in the law, or for any other sufficient reason, the courts may make such changes, subject to the final control of the supreme judicial court, which may, by general rule, regulate such changes in all the courts. Original writs issued by trial justices shall be signed by the justice before whom the action is brought, and shall be dated and filled up like other original writs.” Revised Laws, Massachusetts, c. 167, s. 15.

## 3. *Form of the Original Writ.*

### COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

SEAL.

To A. B., of Boston, in said county,

Greeting :

We command you that you appear at our Superior Court next to be holden at Boston, within and for our County of Suffolk aforesaid, on the first Monday of April next; then and there to answer to C. D., of said Boston, in an action of contract, which action the said plaintiff has commenced against you, to be heard and tried at our said Court; and your goods or estate are attached to the value of three hundred dollars, for security to satisfy the judgment which the said plaintiff may recover upon the aforesaid trial. Fail not of appearance at your peril.

Witness, A. M., Esquire, at Boston, the first day of March, in the year of our Lord one thousand nine hundred and two:

J. A. W Clerk.

From the office of G. & H.

4. *By Whom Process may be Served.*

“It is the duty of sheriffs and their deputies, acting within their respective counties, to serve and execute all writs and precepts lawfully issued to them.” R. L. c. 23, s. 12.

“Constables who have given a bond in the sum of \$1,000 may in their own towns serve writs and processes in personal actions in which the damages are not laid at a sum larger than \$200, and any process in replevin in which the subject-matter does not exceed in value \$200, and any writ or other process under the law relating to summary process for the recovery of land. Or these officers may give bonds in a sum not less than \$3,000, and become authorized to serve the processes described above whenever the *ad damnum*, or the value of the goods replevied, does not exceed \$300. No constable is qualified to serve civil process until he has given a bond.” R. L. c. 25, ss. 83, 84.

[The connection between the common law and statutory systems of pleading will be dealt with at length in the following chapter. — ED.]

## PART II.—PLEADINGS IN PERSONAL ACTIONS.

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### CHAPTER VI.

#### DECLARATIONS.

**PROBLEM.** Draw a declaration, say in trover, upon a given state of facts. **Procedure.** (1) Ascertain from the following pages the requisites of the declaration, both substantive and formal. (2) Note how those requisites are dealt with in the form of declaration in trover hereinafter presented. (3) From the quoted text, determine how the form of the allegations should be varied to suit the given facts on which the declaration required is to be drawn. (4) Draw it.

The same method in developing a declaration in any other form of personal action may be employed.

#### ESSENTIALS OF A VALID DECLARATION.

PRESENTED TIDD'S PRACTICE, VOL. I. PAGE 361.

##### THE TITLE.

"On the return of the writ, when the defendant has appeared, and filed common bail, when necessary, or put in and perfected special bail, the plaintiff in due time should declare against him.

"The declaration is a legal specification of the cause of action; and in actions by original, is an exposition of the writ, with the addition of time, place, and other circumstances.

"The parts of a declaration are, first, the title; secondly, the venue; thirdly, the commencement; fourthly, the statement of the cause of action; and lastly, the conclusion.<sup>1</sup> The declaration by

<sup>1</sup> In Heath's Maxims, it is said that a count or declaration, being terms equivocal, ought principally to contain three things: first, the plaintiff's and defendant's names, which in actions real are called demandant and tenant, and the nature of the action; and this by some is termed the demonstration, or demonstrative part of the count: secondly, the time, the place, and the act; in which ought to be comprehended how,

bill should regularly be entitled of the day on which the writ is returnable; for the bill, of which it is a copy, cannot be filed till the bail is put in, which cannot be till the return of the writ. And where there are several defendants, who put in bail of different terms, the declaration should be entitled of the term when the last bail was put in. In practice it is usual, when the cause of action will admit of it, to entitle the declaration, whether by bill or original, generally, of the term in which the writ is returnable; and though filed or delivered, it cannot regularly be entitled of a subsequent term. But it should always be entitled after the time when the cause of action is stated to have accrued; therefore, where the cause of action is stated to have accrued after the first day of the term in which the writ is returnable, the declaration should be entitled of a subsequent day in that term, and not of the term generally; for a general title refers to the first day of the term; and upon such a title, it would appear that the action was commenced before the cause of it accrued. Yet, where the cause of action was stated to have accrued on the first day of term, the court, on demurrer, held that the declaration might be entitled of the term generally; for the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered till the sitting of the court; so that the cause of action might well have accrued before the actual delivery of the declaration. Where a declaration is improperly entitled, the plaintiff may have it corrected on an affidavit of the fact. And leave has been given to amend the declaration, by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed. Or it may be set right, at the instance of the defendant, if necessary for his defence. Thus, where the declaration is entitled of the term generally, and the defendant pleads *plene administravit*, or a tender made before the exhibiting of the bill, upon which he would give in evidence an administration of assets, or tender made, between the first day of the term to which the bill relates and the day of suing out the writ; he has a right to call upon the plaintiff, to entitle his declaration properly."

and in what manner, the action did accrue, or first arise between the parties; when, what day, what year, and what place, and to whom the action shall be given; which is called the declarative part of the count: and lastly, the perclose or conclusion, which is *unde deterioratus est*, etc.; in which the plaintiff ought to aver, and proffer to prove his suit, and show the damage he hath sustained, by the wrong and injury done by the defendant. And the declaration, according to this definition, consisting of a tria, somewhat resembling the logical major, minor, and conclusion, some of the ancients (among whom none was more fond of it than Mr. Fleetwood, the famous recorder of London) conceived it to be a perfect syllogism. Heath's Max. 2.



## THE VENUE.

PRESENTED TIDD'S PRACTICE, VOL. I. PAGE 368.

"The venue in personal actions, or county where the action is laid, and intended to be tried, is local or transitory. When the action could only have arisen in a particular county, it is local, and the venue must be laid in that county; for if it be laid elsewhere, the defendant may demur to the declaration, or the plaintiff, on the general issue, will be nonsuited at the trial. Such are all real and mixed actions, and actions of ejectment, and trespass *quare clausum fregit*, etc. But where the action might have arisen in any county, as upon contracts, it is transitory, and the plaintiff may in general lay the venue wherever he pleases; subject, however, to its being changed by the court, if not laid in the very county where the action arose.

"To use the words of Lord Mansfield, in the case of *Fabrigas v. Mostyn*:<sup>1</sup> 'There is a formal and a substantial distinction as to the locality of trials. I state them, says he, as different things. With regard to matters arising within the realm, the substantial distinction is where the proceeding is *in rem*, and where the effect of the judgment could not be had, if it were laid in a wrong place. That is the case of all ejectments, where possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, and the officers are county officers, the judgment could not have effect, if the action were not laid in the proper county.

"With regard to matters that arise out of the realm, there is a substantial distinction of locality too: for there are some cases that arise out of the realm which ought not to be tried anywhere but in the country where they arise; as if two persons fight in France, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution, it must be laid to be against the peace of the king; but the breach of the peace is merely local, though the trespass against the person is transitory. So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

"But there is likewise a formal distinction, which arises from the mode of trial: for trials in England being by jury, and the kingdom

<sup>1</sup> Cowper, 76, 77.

being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad; but the law makes a distinction between transitory and local actions. If the matter, which is the cause of a transitory action, arise within the realm, it may be laid in any county, the place not being material; as if an imprisonment be in Middlesex, it may be laid in Surrey, and though proved to be done in Middlesex, it does not at all prevent the plaintiff from recovering damages. The place of transitory actions is never material, except where by particular acts of parliament it is made so; as in the case of church-wardens and constables, and other cases which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the court in time to change the venue; but if they go to trial without it, that is no objection.

“‘So all actions of a transitory nature that arise abroad may be laid as happening in an English county. But there are occasions which make it absolutely necessary to state in the declaration that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration state a specialty to have been made at Westminster in Middlesex, and upon producing the deed it bear date at Bengal, the action is gone; because it is such a variance between the deed and the declaration as makes it appear to be a different instrument. But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a venue only for form, and for the sake of trial, by a *videlicet*, in the county of Middlesex, or any other county.’”

“In an action upon a lease for rent, etc., where the action is founded upon the privity of contract, it is transitory, and the venue may be laid in any county, at the option of the plaintiff; but where the action is founded upon the privity of estate, it is local, and the venue must be laid in the county where the estate lies. Thus in an action of debt or covenant, by the lessor against the lessee, the action, being founded on the privity of contract, is transitory. So if an action of debt be brought by the lessor against the executor of the lessee, in the detinet only, it is transitory. But if the action be brought, as it may, against the executor of the lessee as assignee, upon the privity of estate, in the detinet and detinet, it is local. In covenant by the grantee of the reversion against the lessee, the action being founded

on the privity of contract, which is transferred from the lessor to the grantee, by the operation of the statute 32 Hen. VIII. c. 34, the action is transitory. But in debt by the assignee, or devisee of the lessor, against the lessee, which is founded on the privity of estate, the action is local. So if an action of debt or covenant be brought by the lessor, or his personal representatives, or by the grantee of the reversion, against the assignee of the lessee, it is local, and the venue must be laid in the county where the land lies.

“There are, however, some actions of a transitory nature, wherein the venue by act of parliament must be laid in a particular county. Such are all actions upon penal statutes, and actions upon the case or trespass against justices of peace, mayors, or bailiffs of cities or towns corporate, headboroughs, port-reves, constables, tithing-men, church-wardens, etc., or other persons acting in their aid and assistance, or by their command, for anything done in their official capacity; and also actions against any person or persons, for anything done by an officer or officers of the excise or customs, or others acting in his or their aid, in execution or by reason of his or their office. In these actions, the venue, by various acts of parliament, must be laid in the county where the facts were committed, and not elsewhere.

“On the other hand, the venue, in a transitory action, is in some cases altogether optional in the plaintiff; as where the action arises in Wales, or beyond the sea, or is brought upon a bond or other specialty, promissory note, or bill of exchange, for *scandalum magnum*, or a libel dispersed throughout the kingdom, against a carrier or lighterman, or for an escape or false return, and in short, wherever the cause of action is not wholly and necessarily confined to a single county. In these cases, the venue cannot be changed by the court, but upon a special ground.

“In actions by original, the venue in the declaration should be laid in the county where the writ was brought; for otherwise, we have seen, the plaintiff will lose his bail. And it is a general rule, that the county in the margin will help, but not hurt.<sup>1</sup> Hence, if there be no venue laid in the body of the declaration, reference must be had to the margin; but where a proper venue is laid in the body, the county in the margin will not vitiate it.

“In actions by bill, against common persons, the declaration begins by stating the defendant to be in custody of the marshal; or if he be in custody of the sheriff, or bailiff, or steward of a

<sup>1</sup> Lord Hardwicke was of opinion, that the word *ss.* in the margin of the declaration was not originally meant to signify the county, but was only a denotation of each section or paragraph in the record. *Cas. temp. Hardw.* 344.

franchise, having the return and execution of writs, it should allege in whose custody he is, at the time of the declaration, by virtue of the process of the court, at the suit of the plaintiffs. If the action be brought by or against particular persons, as assignees, executors, etc., the special character in which they sue, or are sued, should be set forth in the beginning of the declaration. And in actions against attorneys, instead of stating that they are in the custody of the marshal or sheriff, it should be stated that they are present in court; or in actions against peers or members of the House of Commons, that they have privilege of parliament."

### WALTON *v.* KERSOP AND ANOTHER.

IN THE COMMON PLEAS. 1767.

REPORTED 2 WILSON, 354.

Replevin, and declares for taking his cattle at M. Defendant pleads *non cepit modo et forma*; plaintiff proved the cattle were in the defendant's custody at M. Defendant proved they were originally taken at H. Judgment for the plaintiff.

Replevin. The plaintiff declares for taking his cattle in Market-street ward; the defendant pleads the general issue *non cepit modo & forma*; this cause was tried before Mr. Justice Gould at the last assizes for Northumberland; when the plaintiff proved that the cattle were in the custody and possession of the defendant at Market-street, where he was driving them to the pound; the defendant proved that he first and originally took them at Hardhall, in the parish of Warden, and was driving them through Market-street unto the pound; it was insisted at the trial, that the plaintiff had not proved his declaration, that the cattle were taken at Market-street, as it was alleged therein, for that the defendant had proved they were first taken at another place, viz. at Hardhall, in the parish of Warden. There was a verdict for the plaintiff subject to the opinion of the court.

Sergeant Glynn, for the plaintiff, insisted that the plaintiff had well proved the taking at Market-street, as laid in the declaration, for he proved the cattle were there in the defendant's custody, and although it may be true that the defendant originally took them at Hardhall, yet, as he the plaintiff was unable to prove the taking there, it would be very unreasonable and inconvenient if he was obliged to lay the taking there. That the defendant ought to have pleaded in abatement, and alleged that they were taken at Hardhall, *absque hoc* that they were taken at Market-street, upon

which the plaintiff might have taken issue, or confessed the plea, and justified the taking at Hardhall, and driving them to Market-street towards the pound; and he insisted that wherever the defendant has the cattle wrongfully in his custody that is a wrongful taking at that particular place; as in the case of larceny committed in one county, and the felon flies with the goods into another county, it is a felony in both counties, and he may be tried in either county.

Sergeant Burland, for the defendant, insisted that upon the plea of *non cepit modo et forma*, the defendant may prove the taking was at a different place from that laid in the declaration; and for that purpose cited *Johnson v. Wollyer*, 1 Stra. 508; 2 Mod. 199. Anonym., by Lord North, C. J., if the plaintiff alleges the taking at A., and they were taken at B., the defendant may plead *non cepit modo et forma*, but then he can have no return, for if he would have a *retorn' habendo*, he must deny the taking where the plaintiff hath laid it, and allege another place in his avowry. He also said that in replevin the first place of taking is the only material place, and must be laid in the declaration, and it is not like the case of larceny above mentioned.

Wilmot, Chief Justice. At this day it is very clear that the vill and place where the cattle are taken must be laid in the declaration, if there is no place defendant may demur, but here is a place laid; and it was proved the cattle were in defendant's possession there; and though originally defendant took them at another place, yet if he took them wrongfully at first, the wrong is continued to any place where the defendant has them. 1 Stran. 508, is only a case at *nisi prius*, and 2 Mod. 199, a dictum of Lord North; and neither of those cases are like this, for here is a sufficient proof (in my opinion) of the plaintiff's declaration, to wit, that the cattle were taken at Market-street; this case is very clear, and like the case mentioned of larceny, the wrong continues wherever the defendant has the cattle; and I am quite satisfied the defendant's evidence was irrelevant and immaterial on this issue, and ought not to have been admitted, unless the defendant had pleaded in abatement. And of this opinion was the whole court, and the *Postea* was ordered to be delivered to the plaintiff. See Cro. Eliz. 896; Hob. 16; Moor, 678. See the case of *Riley v. Parkhurst*, ante, Trin. 21-22 Geo. II. [reported 1 Wilson, 219] cited by Bathurst, Justice.

[*Extract from*]HALL *v.* WINCKFEILD.

IN THE KING'S BENCH.

REPORTED HOBART, 195 A.

"Again the books are, and I agree, that if a man recover damage or debt in the common pleas, upon trespass or obligation laid in another county, if the plaintiff will bring an action of debt for the sum recovered, he must lay it in the county of Mid. and not in the county where the first action arose; and the reason is apparent; for he must count upon the record, by which it appears to the court that the cause of this action ariseth in Mid. where the judgment was given, and the record for that trespass that was done, and that obligation that was made, in another county, is not the cause of this action, but the judgment, which hath made *novationem contractus*, which begins there, and regularly it is true that every action must be brought in that county where by the record it appears that the cause of action began, which sometimes may admit of an election; as where the admiral court sits in Mid. and summons a party in Essex, the action upon the statute may be in either of both counties."

## THE COMMENCEMENT.

PRESENTED TIDD'S PRACTICE, VOL. I. PAGE 375.

"In account, covenant, debt, annuity, detinue, and replevin, where the original is a summons, the declaration by original writ begins by stating that the defendant was summoned to answer; in actions on the case, trespass, ejectment, etc.) where the original is an attachment, it states that he was attached to answer. But where by the declaration it appears, that the defendant was summoned instead of attached, or *vice versa*, the defendant cannot demur, without craving *oyer* of the original, and setting it forth, in order to show that it does not warrant the declaration.

"It was formerly usual for the declaration by original to repeat the whole of the original writ. But this practice being productive of great and unnecessary prolixity, a rule of court was made, that 'declarations in actions upon the case and general statutes, other than debt, repeat not the original writ, but only the nature of the action; as that the defendant was attached to answer the plaintiff, in a plea of trespass upon the case, or in a plea of trespass and con-

tempt, against the form of the statute.' And even in trespass *vi et armis*, commenced by original, it has been deemed sufficient, on a general demurrer, to state in the declaration that the defendant was attached to answer the plaintiff in a plea of trespass, without setting forth the circumstances."

## THE CAUSE OF ACTION.

### I. CONTRACTS.

#### *Forms and Requisites of Declarations Ex Contractu.*

The student who seeks to arrive at a clear knowledge of the requisites of the several declarations at common law by examining the precedents in the books will be confused hopelessly by the mass of surplusage in the pleadings. Although the rule against surplusage "appears to have prevailed at the earliest periods, it seems to have been nearly forgotten during a subsequent period of our legal history."<sup>1</sup>

It is believed that in separating surplusage in the precedents from required allegations, the student will be materially aided by comparing the brief declarations in use under the Massachusetts Practice Act with those of the common law, in the light of the following case.

#### ABBA READ AND ANOTHER *v.* WILLIAM SMITH.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1861.

REPORTED 1 ALLEN, 519.

The substantive averments required in declarations at common law and under the Massachusetts Practice Act are identical.

Contract. The first count was for goods sold, as by account annexed. The second count was as follows: "And the plaintiffs say they made a contract with the defendant, wherein and whereby they agreed with the defendant to send him certain barrels and half-barrels containing beer, at his request, and did do so; and the defendant, in consideration thereof, agreed to return the same or pay therefor; and the plaintiffs say the defendant did not return the said barrels, but that they delivered to him one hundred and thirty-nine barrels and forty-two half-barrels, which the said de-

<sup>1</sup> Perry, Pleading, 412.

fendant has not returned, and that the defendant owes the plaintiffs therefor two dollars for each barrel, and one dollar and fifty cents for each half-barrel." The defendant demurred to the second count, assigning for cause that it did not allege any time within which the barrels and half-barrels were to be returned, or any request for their return ; but Brigham, J. overruled the demurrer. The defendant then, "reserving the right to be further heard on his demurrer," filed an answer to this count, denying the contract therein set forth.

At the trial in the superior court, it appeared that the plaintiffs were brewers, living in Troy, in the State of New York, and that they sold ale to the defendant, who lived in Boston, and sent it to him in barrels and half-barrels, in large quantities. The only evidence of the agreement as to the barrels and half-barrels was contained in the depositions of the two plaintiffs, one of whom stated it as follows : "He (the defendant) agreed to return all the casks that we should send him ; or, if for any reason he should not return all, then he agreed to pay for them at the rate of two dollars for each barrel and one dollar and fifty cents for each half-barrel ;" and the other plaintiff stated it substantially in the same way.

The defendant moved for a nonsuit on the ground of a variance between the declaration and the proof, but the court ruled that there was no variance.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

E. M. Bigelow, for the defendant.

T. H. Russell, for the plaintiffs.

Chapman, J. If the verdict had been upon the general count it must have been sustained, for the evidence tended to prove an executed contract of sale and delivery. Whenever by the terms of the agreement the casks became the property of the defendant, they were his by sale and delivery ; and nothing remained to be done but to pay the price. In such case a general count is sufficient, the claim being merely for money, and founded in a past or executed consideration. 1 Chit. Pl. 316, 372 ; *Felton v. Dickinson*, 10 Mass. 287 ; *Baker v. Corey*, 19 Pick. 496 ; *Holbrook v. Dow*, 1 Allen, 397.

But the verdict is upon the special count, which declares upon the contract as executory. In such case the rule of pleading was, before the Practice Act, that the declaration must allege all the circumstances necessary for the support of the action, and contain a full, regular, and methodical statement of the injury which the plaintiff has sustained, with such precision, certainty, and clearness that the defendant, knowing what he is called upon to answer, may



be able to plead a direct and unequivocal plea; and that the jury may be able to give a complete verdict upon the issue, and the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises. 1 Chit. Pl. 285.

The Practice Act [of Massachusetts] has made no change in this respect; for although by this act the facts may be briefly stated, yet all the facts must be stated which are necessary to constitute the cause of action. *Hollis v. Richardson*, 13 Gray, 392. The principal changes made by that act in respect to declarations were, (1) It adopted a suggestion which was recently made by Mr. Long to the British commissioners, that the number of personal actions should be reduced to two. (2) That no averment need be made which the law does not require to be proved. As incident to these changes some other formal changes were made. But the act distinctly requires that the substantive facts necessary to constitute the cause of action shall be set forth with substantial certainty. And though it changes the forms of pleading and dispenses with technicalities, it is still important in framing declarations and answers, so as to present causes properly for trial, that the principles of special pleading should be carefully regarded.

By the contract appearing in the bill of exceptions as executory, the casks were to be returned in a reasonable time or upon request. If in a reasonable time, as the evidence seems to show, the plaintiff must prove that a reasonable time had elapsed; and this is a substantive fact necessary to constitute his cause of action. He ought therefore to have alleged it.

If they were to be returned upon request, the request was a substantive fact to be proved, and therefore it must be alleged. The declaration omits to state any time within which they were to be returned or paid for. *Non constat* that it was to be before the commencement of the action. The allegation that the defendant owes the plaintiff therefor is the statement of a conclusion of law, and not of a substantive fact. *Hollis v. Richardson, ubi supra* [13 Gray, 392]. This allegation does not supply the defect. The defendant's demurrer entitles him to take advantage of this defect. If a defendant chooses to go to trial upon a defective declaration without demurring to it, or moving the court for an order upon the plaintiff to make his allegations more full and particular, it is to be presumed that he was sufficiently informed as to the plaintiff's case, and the rule is proper that he shall not then be permitted to disturb the verdict. And the same is true where a plaintiff chooses to go to trial upon a defective answer. But, if the defect is pointed out beforehand in a proper way, the pleader must amend or proceed at his peril.

Another objection taken at the trial was that there was a variance between the declaration and the proof. The declaration does not state that any price was agreed upon, but left it as a *quantum volebant*. The allegation that the defendant owed the plaintiff a certain sum for the casks was not an allegation that this sum was the price agreed. But the proof was that a price had been agreed upon; and this variance was material. Exceptions sustained.<sup>1</sup>

[It seems to follow, then, that the substantive averments in declarations under the Practice Act of Massachusetts and under the common law are identical: to determine one is to determine both; and the difference between the two is, that the Practice Act excludes only the fictitious and merely formal averments which the common law requires.

Let  $x$  equal the requisites of a declaration at common law, with its substantive averments necessary to make out a *prima facie* case, and its formal averments and fictions. Let  $y$  equal the requisites of a declaration under the Practice Act of Massachusetts, with its substantive averments necessary to make out a *prima facie* case, and its absence of formal averments and fictions. Then  $x$  minus  $y$  will equal the formal averments and fictions peculiar to the declaration of the common law and surplusage. Ascertain the fictions peculiar to the several actions; ascertain their merely formal averments; and one has the basis of a valid declaration, minus surplusage. — ED.]

#### DEBT ON A SIMPLE CONTRACT.

The following is a valid declaration under the Practice Act in Massachusetts. Let it equal  $y$ .

$y$ . Goods sold. "And the plaintiff says that the defendant owes him \$100 for goods sold by the plaintiff to the defendant." Public Statutes, Massachusetts, c. 167, p. 976, form 3.

<sup>1</sup> By the Practice Act of Massachusetts it is provided that

"There shall be only three divisions of personal actions:

"First, Contract, which shall include actions formerly known as *assumpsit*, *covenant*, and *debt*, except actions for penalties.

"Second, Tort, which shall include actions formerly known as *trespass*, *trespass on the case*, *trover*, and actions for penalties. [Note that *detinue* is not mentioned. It never was sanctioned in Massachusetts.]

"Third, *Replevin*." Revised Laws, Massachusetts, c. 173, sec. 1.

"A declaration in a personal action shall conform to the following requirements:

"Second, It shall state concisely and with substantial certainty the substantive facts necessary to constitute the cause of action.

"Third, it need not aver a fact which is not required by law to be proved." Revised Laws, Massachusetts, c. 173, sec. 6.

The following is a valid declaration at common law.  
Let it equal *x*.

*x*. In the Common Pleas.

The 12th day of June, 1845.

Somersetshire, to wit. — Johnathan Gregory, (the plaintiff in this suit), by Abraham Elliot, his attorney, complains of James Johnson (the defendant in this suit) who has been summoned to answer the said plaintiff in an action of debt, and he demands of the said defendant the sum of £500, which he owes to and unjustly detains from the said plaintiff. For that whereas, the said defendant heretofore, to wit, on the first day of December, in the year of Our Lord, 1844, was indebted in £500, for goods then sold and delivered by the said plaintiff to the said defendant, at his request, to be paid by the said defendant to the said plaintiff on request. Whereby, and by reason of the nonpayment thereof, an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of £500, above demanded. Yet the said defendant, though often requested, hath not paid the said sum of £500, above demanded, or any part thereof, to the damage of the said plaintiff of £50, and therefore he brings this suit, etc. Warren, Law Studies, 583.

Both declarations contain

- (1) A statement of the right on the part of the plaintiff (i. e. that the plaintiff delivered up to the defendant a chattel for a sum certain) and
- (2) A statement of the wrong or violation of the right by the defendant (i. e. that the defendant does not deliver up the sum certain. This is comprehended in the first declaration by "owes").

Subtract these substantive averments in *y* from *x*. There remain in addition to the averments indicated

- (3) An allegation of breach.
- (4) An allegation of damage.

Formal averments common to all declarations are here in all cases left unmentioned.

### GOODCHILD *v.* PLEDGE.

IN THE EXCHEQUER. 1836.

REPORTED IN 1 MEESON & WELSBY, 363.

The importance of the allegation of breach in a declaration in debt.

Debt, in the sum of £20, for goods sold and delivered; for board, lodging, and other necessities, found and provided by the plaintiff

for the servant of the defendant, and at his request; and on an account stated. Pleas: first, *nunquam indebitatus*; secondly, as to the first count, that before the commencement of the suit, and when the said sum of £20 in that count mentioned became due and payable, to wit, on the 1st of January, 1836, the defendant paid to the plaintiff the said sum of £20, according to the defendant's said contract and liability in the said first count mentioned; concluding to the country. The latter plea was specially demurred to, on the ground that it ought to have concluded with a verification.

Mansel, in support of the demurrer, relied on *Ensall v. Smith*, 1 C. M. & R. 522; s. c. *nomine* *Ansell v. Smith*, 3 Dowl. P. C. 193. The plea of payment is clearly treated in the new rules as a plea in confession and avoidance. It makes no difference that it is stated here that the defendant paid when the money became due according to the contract: he still admits the cause of action. The plea of *solvit ad diem* is an analogous one. [Parke, B. There it is clearly new matter, being, in effect, a plea of performance of the condition in the bond.] The plaintiff has a right to an answer to the allegation of payment in the plea; and if it be true that the money was so paid, he may enter a *nolle prosequi* as to that part of the demand, and go on for the rest.

Ogle, *contra*. This plea is quite distinguishable from that in *Ensall v. Smith*. Here the declaration is in debt, not in assumpsit; and the defendant meets the claim by stating that, when the debt accrued, he paid the money according to his contract and liability. In *Ensall v. Smith*, the plea was merely that the defendant has paid the same; but here, if the payment was after breach, or after request, it could not be according to the contract and liability. It is a simple denial of the breach, not introducing new matter, and therefore rightly concludes to the country. The defendant shows that there never was any suable cause of action, because the moment the debt accrued, he paid it. [Parke, B. Is the statement of the breach in debt anything more than a mere form? The moment the goods are delivered, is there not a cause of action, throwing the proof of its discharge on the defendant? If the breach is mere form, you cannot traverse it; then your plea is in discharge, and ought to conclude with a verification. Suppose *nil debet* pleaded, under the old form; would it not be sufficient to prove the debt contracted? The new general issue, that the defendant never was indebted, that is, at no instant of time, was framed for the express purpose of making all these defences pleadable by way of discharge.] This plea shows that the plaintiff never was entitled to sue.

Lord Abinger, C. B. If this is payment, as it undoubtedly is, it is a plea in confession and avoidance within the new rules.

Parke, B. I admit that this plea is distinguishable from that in *Ensall v. Smith*. But here also the defendant includes in the plea a something that is not alleged in the declaration; because it is not stated in the declaration that the defendant did not pay according to the contract. I think it will be found, on looking into the cases, that the statement of the breach is mere form; if so, the plea admits the debt, and is a plea in confession and avoidance; and it is so treated in the new rules. Under the general issue, as now framed, you deny the existence of a debt at any one time: if you admit a debt, you must plead every matter specially by which you seek to discharge it.

Alderson, B. If this is payment, it is payment of a debt; then it admits a debt; therefore it is in discharge, not in denial.

Ogle then obtained leave to amend, on payment of costs.

Per Lord Mansfield in *Cuming v. Sibby*, 4 Burrows, at 2490 (1769): "There are no damages to be given in these popular actions [i. e. actions of debt by common informers to recover money upon penal statutes]. This statute gives costs indeed; but here the damages and costs are blended together."

"The damages in an action of debt are in general merely nominal, and not, as in assumpsit, the principal object of the suit, and therefore a small sum, as £10, is usually inserted." 1 Chitty, Pleading, 374 [14th Am. ed.].

Strike out all but 1, 2, 3, and 4 from the declaration *x*. The uneliminated matter is the basis of a valid declaration at common law.<sup>1</sup>

#### COVENANT.

The following is a valid declaration under the Practice Act in Massachusetts. Let it equal *y*.

<sup>1</sup> Declaration in Debt. — Expanded Statement: 1. (a) A statement of fact consisting of some act on the plaintiff's part, as money paid by plaintiff for defendant's use, goods sold, or work done, or (b) some act on defendant's part, as signing and sealing a specialty promising to pay plaintiff a certain sum of money, or (c) some judgment or other record in favor of plaintiff against defendant, or (d) some statute providing a penalty together with the recital of such facts as show that defendant has subjected himself to the penalty, and that plaintiff has the right to recover, or any other facts on which a duty would arise on defendant's part to pay plaintiff a sum certain. 2. A breach of defendant's duty to pay. Ex. Demand and refusal. That this is mere matter of form see *Goodchild v. Pledge*, 1 Meeson and Welsby, 363. 3. Damages. At the later common law this is form also. See remarks of Dean Ames, *supra*, 235.

“ And the plaintiff says the defendant delivered to him a deed, a copy whereof is hereunto annexed :

“ And the defendant was not seised in fee of a part of the land described as follows (describing it), but the same was held adversely by one L. M. ; and the residue of said land was not free from incumbrances, but was subject to a mortgage to one S. T., to secure the payment of six hundred dollars.

“ And the defendant has not warranted and defended the premises against the rightful claims of all persons, but one W. S. had a right of dower therein, and has compelled the plaintiff to assign the same to her.” Public Statutes, Massachusetts, c. 167, p. 977, form 3.

The following is a valid declaration at common law.  
Let it equal *x*.

#### ON A NOTE UNDER SEAL.

“ For that the said T., on etc., at etc., by his deed of that date, in court to be produced, covenanted with the plaintiff to pay him or his order, the sum of \$100, on demand, with interest for the same until paid ; yet the said T., though often requested, hath not paid the said sum of \$100, nor the interest thereof, but wholly neglects and refuses so to do. And so the said T. his said covenant hath not kept, but hath broken the same. R. Dana.” Oliver, *Precedents*, 236.

Both declarations contain statements (excepting the fourth here made), as follows :

1. That defendant made with plaintiff a contract under seal.
2. Profert of such contract or excuse for not making it.<sup>1</sup>
3. Recital in words or substance of so much of the covenant as is essential to show a cause of action.
4. Performance of all conditions precedent or excuse of nonperformance. (No such conditions, however, appear in the forms here given.)
5. Breach — In ordinary covenants several breaches may be assigned in one count. In penal bonds, only one breach may be laid in one count, otherwise the count would be bad for duplicity.
6. Damages.

<sup>1</sup> In Massachusetts to-day, it is enough to allege sufficient of the substance of the deed to maintain the action, without making profert.

Subtract  $y$  from  $x$ . The result is zero. Therefore the common-law declaration in covenant contains no fictions, and that here given, no superfluous averments.

GENERAL ASSUMPSIT.

The following is a valid declaration under the Practice Act of Massachusetts :

“ And the plaintiff says the defendant owes him \$1,000 for goods sold by the plaintiff to the defendant.” Public Statutes, Massachusetts, c. 167, p. 976.

The following is a valid declaration at the common law :

“ Durham, to wit, John Peacock, late of the city of Durham, in said county, Alderman, was attached to answer Richard Bell and Benjamin Kendal, of a plea wherefore, whereas the said John, on the 11th day of November, in the 17th year of the reign of our lord Charles the Second, now king of England, etc., at the city of Durham, in the said county, was indebted to the said Richard and Benjamin in £39 of lawful money of England, for divers wares and merchandises by the said Richard and Benjamin before that time sold and delivered to the said John Peacock at his special instance and request; and being so indebted, he the said John, in consideration thereof, undertook, and then and there faithfully promised the said Richard and Benjamin, that he the said John Peacock would well and faithfully pay and content the said £39 to the said Richard and Benjamin when he should be thereunto requested; yet the said John not regarding his said promise and undertaking in form aforesaid made, but contriving and fraudulently intending craftily and subtly to deceive and defraud them the said Richard and Benjamin of the said £39 has not yet paid the said £39 or any penny thereof, to the said Richard and Benjamin, or any ways contented them for the same, (although so to do the said John afterwards, to wit, on the last day of November, in the said 17th year of the reign of our lord Charles the Second, now king of England, etc., at the city of Durham, in the said county, was often requested by the said Richard and Benjamin), but to pay the same to them, or in any ways to content them for the same, has altogether refused, and still refuses, to the damage of the said Richard and Benjamin of £40, etc. And whereupon the said Richard and Benjamin, by Ralph Adamson, their attorney, complain, that whereas the said John, on the 11th day of November, in the 17th year of the reign of our lord Charles the Second, now king of England, etc., at the city of Durham, in the said county, was indebted to the said Richard and Benjamin in £39 of law-

ful money of England, for divers wares and merchandises by the said Richard and Benjamin before the time sold and delivered to the said John Peacock at his special instance and request; and being so indebted, he the said John, in consideration thereof, undertook, and then and there faithfully promised the said Richard and Benjamin, that he the said John Peacock would well and faithfully pay and content the said £39 to the said Richard and Benjamin when he should be thereunto requested; yet the said John, not regarding his said promise and undertaking in form aforesaid made, but contriving and fraudulently intending craftily and subtly to deceive and defraud them the said Richard and Benjamin of the said £39, has not yet paid the said £39 or any penny thereof, to the said Richard and Benjamin, or any ways contented them for the same, (although so to do the said John afterwards, to wit, on the last day of November, in the 17th year of the reign of our lord Charles the Second, now king of England, etc., at the city of Durham, in the said county, was often requested by the said Richard and Benjamin), but to pay the same to them, or in any ways to content them for the same, has altogether refused, and still refuses, to the damage of the said Richard and Benjamin of £40, etc.; and therefore they bring suit, etc.” From *Peacock v. Bell and Kendal*, 1 Saunders’ Reports, 70.

Both declarations contain the following averments:

- (1) A statement of the plaintiff’s right.
- (2) A statement of the wrong, or breach on the part of the defendant.

But in that under Massachusetts Practice, the plaintiff’s right is averred by merely setting forth the facts from which defendant’s duty to pay arose. There is nothing said about a promise; but just as, in special assumpsit, the foundation of the action is an express promise, so, in general assumpsit, the basis of the action is an implied promise. Thus, if we examine the common-law declarations in general assumpsit, we find, under the statement of the plaintiff’s right, not only a statement of such facts as will show the existence of a debt due from the defendant to the plaintiff, but also a statement of the (fictitious) promise on the part of the defendant.

Note also the allegation of deceit in the common-law declaration.<sup>1</sup>

<sup>1</sup> For further information as to the general requisites of declarations in assumpsit, see *supra*, 235.



## SPECIAL ASSUMPSIT.

The following is a valid declaration under the Practice Act of Massachusetts :

For breach of promise of marriage. “ And the plaintiff says that she and the defendant mutually promised to marry each other. And she has always been ready to marry the defendant, but the defendant refuses to perform his promise.” Public Statutes, Massachusetts, c. 167, p. 977, form 7.

The following is a valid declaration under the common law :

“ For that on, etc., at, etc., in consideration that the plaintiffs at the instance and request of the said D. (defendant), had then and there bought of the said D. a certain large quantity, to wit, one hundred quarters of malt, at and for a certain price then and there agreed upon between them, he, the said D., faithfully promised the plaintiffs well and truly to deliver to them the said one hundred quarters of malt, whenever he, the said D., should be thereto requested; and the plaintiffs in fact say, that although the plaintiffs afterwards, viz. on, etc., requested the said D. to deliver them, the said one hundred quarters of malt, and were then and there ready and willing to pay the said D. for the same, according to the terms of the said sale, and were then and there ready and offered to accept and receive the said one hundred quarters of malt, of and from said D.; yet the said D. did not, when requested, as aforesaid, or, at any other time before or since, deliver to the plaintiffs the said one hundred quarters of malt, or any part thereof, but wholly refused, and still refuses so to do.” Oliver, Precedents, 32.

(This declaration was held good on a motion in arrest of judgment; though objected that the plaintiffs should have averred an actual tender, and not a mere readiness and willingness to pay for the malt.)

Both declarations contain the following averments :

1. That defendant made a contract with plaintiff; the latter declaration setting forth, by way of inducement, the circumstances under which the contract was made.
2. A recital in words or substance of the terms of the contract.
3. Consideration. (In contracts which import consideration, i. e. bills, notes, and checks, the allegation of consideration is omitted.)

4. Performance of everything required of plaintiff by the contract, including those things constituting the consideration of defendant's promise as well as conditions precedent.
5. Breach.
6. Damages to be laid in a general sum arising as the legal consequence of such breach.

### SEXTON v. MILES.

IN THE COMMON PLEAS. 1689.

REPORTED 1 SALKELD, 22.

In assumpsit, the plaintiff declared, that in consideration, etc., the plaintiff would deliver unto the defendant, etc., the defendant promised to pay, etc., and in fact *dicit*, that he did deliver, but does not allege a place where; the defendant demurred for want of a venue, and the declaration was held ill, for a consideration executory is traversable.

### STARKEY v. CHEESEMAN.

IN THE KING'S BENCH. 1699.

REPORTED 1 SALKELD, 128.

Plaintiff declared on a bill of exchange against the drawer, showing that the party on whom it was drawn refused to pay it, *per quod onerabilis, devenit*, etc., but laid no express promise. He also laid an *indebitatus assumpsit* and a *quantum meruit*. There was judgment by default, and a writ of inquiry; and now Carthew moved in arrest of judgment, that he has set forth the custom, but has not declared on an express promise; and he argued that it is not enough to set forth a contract for goods, *ratione cujus* the defendant became indebted, etc., nor a submission to an award, *ratione*, etc. And that without allowing an express promise, it must be taken for a mere action of deceit upon the warranty, to which the proper answer is *non. cul.* and then it cannot be joined with the *indebitatus assumpsit* and *quantum meruit*. *Vide* Hard. 486; Hob. 180; 2 Keb. 695; Win. 24; 1 Cro. 302; 1 Ro. 302; 2 Cro. 306; 2 Ro. 366; 1 Keb. 878; 1 Sid. 160. Northey answered, that it was sufficient to count upon the custom, because the custom makes both the obligation and the promise. And Holt, Chief Justice, held the drawing of the bill was an actual promise; and judgment was given *pro quer.*

## LAW v. THOMAS SANDERS.

IN THE QUEEN'S BENCH. 1603.

REPORTED 2 CROKE'S ELIZABETH, 913.

Assumpsit. The declaration was in this manner: "Robertus Law *queritus de Thom. Sanders in custodia mareschalli, etc. pro eo videlicet. Cum in consideratione quod idem le* plaintiff should take to wife the daughter of the said Thomas, *super se assumpsit et eidem Roberto promisit* to pay unto him £100, etc." The defendant pleaded *non assumpsit*, and found for the plaintiff. And it was moved in arrest of judgment, that the declaration was not good; because it was not alleged that the defendant assumed. But it was thereto answered at the bar, that it is necessarily to be intended that the defendant assumed, because it is *queritur versus*, etc., and he is there named; and in consideration that the plaintiff would marry his daughter, *super se assumpsit*, it is of necessity to be intended, that the defendant did assume; and now he having pleaded, the jury found that he did assume, etc.

But all the court held it to be ill; for a declaration ought to contain the substance, otherwise it is not good: and no matter of substance shall be supplied by intendment, nor shall the verdict help it. Wherefore it was adjudged *quod quereus nihil capiat per billam*.

PRESENTED TIDD'S PRACTICE, VOL. I. PAGE 378.

"In actions upon contracts, the declaration must in all cases state the contract upon which the action is founded and the breach of it. And this alone, without more, is in some cases sufficient; as in an action of debt on bond, by the obligee against the obligor. Contracts are either in writing or by parol; if in writing they are either by deed under seal, or by agreement without seal. And they are either express or implied; the former are created by the words, the latter by the obvious meaning and intention of the parties. Thus a covenant is implied, from the *habendum* in a lease, for quiet enjoyment; and from the *reddendum*, for payment of the rent. So on the indorsement of a note or bill, it is implied, that if the drawer or acceptor do not pay it, the indorser will, on having due notice of its nonpayment. And in general, it may be remarked, that promises are implied, to pay money on legal liabilities. With regard to their operation, contracts are present or future; under the former, may be ranked warranties, that a horse is sound, etc.: the latter are

✓ to do or omit some act, or to procure it to be done or omitted by another. Contracts must be stated in the declaration as they were really made, either in terms, or according to their legal effect; and if there be a variance, it will be fatal.

✓ “Where the contract is by deed, it is not necessary to set forth the consideration upon which it is founded; as the law in that case implies a consideration, where none is stated. And a consideration ✓ is also implied, upon bills of exchange, and promissory notes. But in all other cases, the consideration, not being implied, must be stated in the declaration. Considerations are commonly said to be executed or executory; or in other words, the contract is founded upon something already done or to be done. But there is a third species of considerations, partaking of the nature of both the others, as upon mutual promises, where the plaintiff’s promise is executed, but the thing which he has engaged to perform is executory. In the case of a consideration executed, the defendant cannot traverse the consideration by itself, because it is incorporated and coupled with the promise, and if it were not then in fact executed, it is *nudum pactum*. But if it be executory, the plaintiff cannot bring his action till the consideration be performed; and if in truth the promise were made, and the consideration not performed, the defendant must traverse the performance, and not the promise, because they are distinct.

“It is also commonly said, that to make a good consideration there must be either an immediate benefit to the party promising, or a loss to the person to whom the promise was made. But this rule is too narrow. For wherever a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration; as if a man promise to pay a just debt, the recovery of which is barred by the statute of limitations; or if a man, after he comes of age, promise to pay a meritorious debt contracted during his minority, but not for necessities; or if a bankrupt in affluent circumstances, after his certificate, promise to pay the whole of his debts; or if a man promise to perform a secret trust, or a trust void for want of writing by the Statute of Frauds. In these and many other instances, though the promise gives a compulsory remedy, where there was none before, either in law or equity, yet as the promise is only to do what an honest man ought to do, the ties of conscience upon an upright mind are a sufficient consideration.

“Where the promise and consideration explain themselves, without reference to any collateral matter, they are stated in the declaration without any inducement. But where that is not the case,

the declaration begins by stating the circumstances under which the contract was made, or to which the consideration refers; as in an action of assumpsit to pay money, in consideration of forbearance, or of staying proceedings, the declaration begins by stating the debt forborne, or the proceedings that were stayed. The inducement is in nature of a preamble, and leads on to the principal matter of the declaration; and as its office is explanatory, it does not require exact certainty.

"Where the consideration is executed, and the promise to pay a sum certain, or to do or omit some specific act, the declaration proceeds at once from the contract to the breach, without any intermediate averments; as in the case of an *indebitatus assumpsit*, to pay a precedent debt, etc. But where the consideration is executory, or the performance of the defendant's covenant or agreement is made to depend on the performance of a condition precedent, on the part of the plaintiff, the declaration ought to aver that the consideration has been executed, or the condition performed; for it is a rule, that in all cases where the estate or interest commences on a condition precedent, be the condition or act in the affirmative or negative, and to be performed by the plaintiff, the defendant, or any other, the plaintiff ought, in his count, to aver performance; as if a man grant an annuity to another, when he is promoted to such a benefice, etc., the plaintiff in annuity ought to aver, that he is promoted, etc. But where an estate or interest passes or vests immediately, and is to be defeated by a condition subsequent, or matter *ex post facto*, be it in the affirmative or negative, or to be performed by the plaintiff or defendant, or by any other, performance of that matter need not be averred; as if a grant be of an annuity to A. till he be advanced to a benefice, A. in annuity need not say that he is not yet advanced.

"Covenants or agreements are of three kinds: first, such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received, by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff; secondly, there are covenants which are conditions, and dependent, in which the performance of one depends on the prior performance of another; and therefore, till this prior condition be performed, the other party is not liable to an action on his covenant; thirdly, there is also a sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered,

has fulfilled his engagement, and may maintain an action for the default of the other, though it be not certain that either is obliged to do the first act.

“The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties; and however transposed they may be in the deed, their precedency must depend on the order of time, in which the intent of the transaction requires their performance. The words by which conditions precedent are commonly created are *for, in consideration of, ita quod, proinde*, etc. In general, if the agreement be that one party shall do an act, and that for the doing thereof the other shall pay a sum of money, the doing of the act, is a condition precedent to the payment, and the party who is to pay shall not be compelled to part with his money till the thing be performed. And however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest. As if the condition be, that A. shall enfeoff B. and A., do all in his power to perform the condition, and B. will not receive livery of seisin, it was never doubted, but that the right which was to depend on the performance of the condition did not arise. If a person undertake for the act of a stranger, the cases are uniform to show that such act must be performed. And where there are mutual promises, yet if one thing be the consideration of the other, there a performance is in general necessary.

“If a day be appointed for payment of money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing is done; for it appears that the party relied upon his remedy, and intended not to make the performance a condition precedent. But where a certain day of payment, is appointed, and that day is to happen subsequent to the performance of the thing to be done by the contract, in such case the performance is a condition precedent, and must be averred in an action for the money. So if two men agree, one that the other shall have his horse, and the other that he will pay £10 for him, no action lies for the money, till the horse be delivered. Another distinction to be attended to is, that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part, and a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. And it is said, that where the participle doing, performing, etc., is prefixed to a covenant by another person, it is a mutual covenant, and not a condition precedent.”

“An averment may be by any words, which show that the matter is as stated; as that the plaintiff avers, or in fact, saith, or although, or because, or with this, that, etc. And where there is a condition precedent, it is necessary to state in the declaration that it has been performed, or a lawful excuse for its nonperformance. But there are some cases in the books respecting conditions precedent, where the thing agreed to be done having been in effect performed, though not in the exact manner, nor with all the circumstances mentioned, it was deemed a substantial performance; as where the condition was to enfeoff, a conveyance by lease and release has been deemed sufficient. So if the condition be for one to deliver the will of the testator, and he deliver letters testamentary. And wherever a man, by doing a previous act, would acquire a right to any debt or duty, by a tender to do the previous act, if the other party refuse to permit him to do it, he acquires the right as completely as if it had been actually done; and if the tender be defective, owing to the conduct of the other party, such incomplete tender will be sufficient; because it is a general principle, that he who prevents a thing from being done, shall not avail himself of the nonperformance which he has occasioned. The performance of a condition precedent is also excused by the absence of the plaintiff, in those cases where his presence is necessary for the performance of the condition; by his obstructing or preventing the performance; or by his neglecting to do the first act, if it be incumbent on him to perform it. It is also excused in some cases, by his not giving notice to the defendant. Where the conditions are mutual, and to be performed at the same time, the plaintiff must aver that he was ready and offered to perform his part, but the defendant refused to perform his. And where the sum to be paid is not ascertained by the contract, the plaintiff must aver the facts necessary to ascertain it; as upon a *quantum meruit* or *valebant*, that the plaintiff deserved to have, or that the goods were worth, a certain sum, etc.

“Where the contract is to pay a collateral sum upon request, there the request being parcel of the contract, and as it were a condition precedent, ought to be specially alleged, with the time and place of making it; but where the contract is founded upon a precedent debt or duty, as in the case of a bond, or for money lent, etc., or is for the payment of a collateral sum on a day certain, or otherwise than upon request, or the debt or duty arises immediately upon the performance of the consideration, there it is not necessary to allege a special request, but *licet sæpius requisitus* is sufficient; which is only a form of pleading, and, if it be omitted, does not vitiate the declaration.

“Where the matter alleged lies more properly in the knowledge of the plaintiff than of the defendant, there the declaration ought to show that notice was given to the defendant; as where the defendant promises to give the plaintiff so much for a commodity as it is worth, or as any other had given him for the like, or to give so much for every cloth the plaintiff should buy, or to pay the plaintiff what damages he had sustained by a battery, or to pay the plaintiff's costs of suit: and when notice is necessary, it ought to appear that it was given in due time, and to a proper person. But where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, no notice is requisite; as in debt upon an obligation conditioned to perform an award, notice of the award need not be alleged, because the defendant may take notice of it, as well as the plaintiff: so if upon a treaty of marriage, a promise be made to the father of the daughter, by the father of the son, to pay the daughter £100 after the death of the son, if she survive him, and the son die, an action may be brought upon this promise; and notice need not be given to the defendant of the death of the son. So on a promise to pay so much money at the full age of an infant, notice of his attaining that age need not be given, because it is as notorious to the one as to the other. And in an action on a promissory note, by the indorsee against the drawer, notice of the indorsement need not be averred.

“The breach, in a declaration upon contract, is either negative, that the defendant has not done something which he contracted to do, or procured it to be done by another, or that he has not done it, or procured it to be done, in a careful and proper manner; or it is affirmative, that he has done something which he contracted not to do, or suffered it to be done by another, or that he has deceived the plaintiff on a warranty, etc. The breach must be assigned in the words of the contract, or in words tantamount, which comprehend the substance and effect of it: and in assigning the breach of a covenant for quiet enjoyment, it is sufficient to allege, that at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and having such right and title, entered and evicted the plaintiff, without showing what title A. B. had, or that he evicted the plaintiff by legal process. Where the damages sustained by the plaintiff are naturally connected with the breach of contract, it is not usual to state them specially in the declaration; otherwise they should be stated, in order to prevent a surprise upon the defendant.”



## II. TORTS.

## TROVER.

The following is a valid declaration under the Practice Act in Massachusetts :

“To answer A. B. of Boston, in an action of tort.

“And the plaintiff says the defendant has converted to his own use, one horse, the property of the plaintiff.”<sup>1</sup> Pub. Stat. Mass. c. 167, p. 978.

The following is a valid declaration at common law. (The body only of the declaration is given and only so much of that as is necessary for comparison with the above.)

“For that whereas the plaintiff heretofore, to wit, on the 17th day of January, in the year of our Lord 1845, was lawfully possessed, as of his own property, of a certain balloon of great value, to wit, of the value of £500, and being so possessed thereof, the plaintiff afterwards, to wit, on the day and year aforesaid, casually lost the same out of his possession, and the same afterwards, to wit, on the day and year aforesaid, came to the possession of the defendant by finding; yet the defendant, well knowing the said balloon to be the property of the plaintiff, and of right to belong and appertain to him, but contriving and fraudulently intending to deceive and defraud the plaintiff, hath not as yet delivered the said balloon to the plaintiff (although often requested so to do);<sup>2</sup> and afterwards, to wit, on the day and year aforesaid, converted and disposed of the same to his, the defendant's own use, to the damage of the plaintiff of £200, and therefore he brings suit, etc.” Warren, Law Studies, 589.

Both declarations contain the same substantive allegations.

1. An averment of plaintiff's general or special property in a generally described chattel.
2. A conversion by the defendant.
3. Damage.

<sup>1</sup> No allegation of damage is necessary. The *ad damnum* is a sufficient allegation of damage in all cases in which special damages are not claimed. Pub. Stat. Mass. c. 167, p. 978, form 3.

<sup>2</sup> Superfluous? Per Holt, C. J., in *Baldwin v. Cole*, 6 Mod. 212, *supra*. “The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden.” Cf. McKelvey, Pleading, 42.

Subtract these from the common-law declaration. There still remains

#### 4. An allegation of losing and finding.

“The classic count in trover alleges that the plaintiff was possessed, as of his own property, of a certain chattel; that he afterwards casually lost it; that it came to the possession of the defendant by finding; that the defendant refused to deliver it to the plaintiff on request; and that he converted it to his own use, to the plaintiff’s damage. And yet throughout the history of this action the last of the five allegations has been the only one that the plaintiff must prove. The averments of loss and finding are notorious fictions, and that of demand and refusal is surplusage, being covered by the averment of conversion. Under the first allegation the plaintiff need not prove that the chattel was his own property, or that he was in actual possession of it. It is enough to show actual possession as a bailee, finder, or trespasser,<sup>1</sup> or to prove merely an immediate right of possession.” Ames, *History of Trover*, 11 Harv. L. Rev. 2.

“The action of trover and conversion was in its original an action of trespass upon the case, for the recovery of damages against such person as had found another’s goods and refused to deliver them on demand, but converted them to his own use; from which finding and converting it is called an action of trover and conversion. . . . The injury lies in the conversion; for any man may take the goods of another into possession if he finds them; but no finder is allowed to acquire a property therein, unless the owner be forever unknown; and therefore he must not convert them to his own use, which the law presumes him to do if he refuse them to the owner; for which reason such refusal also is, *prima facie*, sufficient evidence of a conversion. The fact of the finding or trover is therefore now totally immaterial; for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and if he proves that the goods are his property, and that the defendant had them in his possession, it is sufficient. But a conversion must be fully proved; and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of detinue or replevin.” 3 Blackstone’s Commentaries, 153.

#### DETINUE.

Detinue never existed in Massachusetts. Hence we can present no form of declaration sanctioned by the legislature of that State.

The following is a valid declaration at common law :

<sup>1</sup> Note that the learned writer does not venture so far as to use the word “thief.”—ED.

"In a plea of detinue for that whereas the plaintiff heretofore, to wit, on the first day of July, 1856, at Farmington, aforesaid, was possessed of a certain house and a certain barn, both situated on the land of the said Daniel Dame, being the house built by the plaintiff in the year 1842, said house being about thirty-six feet long, and about twenty-six feet wide, and one story and one quarter high, and of the value of \$300; and said barn being about twenty-four feet long and about twenty feet wide, and of the value of \$200, situated between the house of Eleazer Rand and the house now owned by Benjamin Chesley, on the left hand side of the road leading from the Bay road, so called, to the Ten Rod road, so called, as one goes toward the Ten Rod road, as of his own house and barn, and being so possessed, the said plaintiff, afterward, to wit, on the third day of July, 1856, casually lost the same out of his possession, which thereafter, to wit, on the same day, came into the hands and possession of the said Daniel Dame, by finding; and the plaintiff further saith, that although the said Daniel Dame well knew that the said house and barn were the proper house and barn of the plaintiff, and although requested by the said plaintiff, to wit, at said Farmington, on the nineteenth day of May, 1860, to deliver the same to the plaintiff, yet the said Daniel Dame hath not delivered up the said house and barn to the plaintiff but wholly refuses so to do, and still unlawfully detains the same." From *Dame v. Dame*, 43 N. H. 37.

The following are the substantive averments in detinue:

1. A description of the chattels sufficient for their identification.
2. An allegation of value of the chattels.
3. Breach of the duty to redeliver the found goods, or breach of the bailment, — that the defendant refused to redeliver the chattels to plaintiff on demand.
4. Damages.

### BOGGS *v.* NEWTON

COURT OF APPEALS, KENTUCKY. 1810.

REPORTED 2 BIBB, 221.

This was a writ of error to a judgment in an action of detinue for a horse.

The declaration contained no description of the horse whatever. He is designated neither by name, color, size, gait, figure, nor any other characteristic mark either natural or artificial, by which he can be distinguished from other animals of the same species. Such

a general mode of declaring may be sufficient in trespass or trover, where damages only are to be recovered; but in this action, where the thing itself is to be specifically recovered, it is fatally defective. Hence it is that detinue will not lie for money, corn, or the like, unless it be in a bag or a sack by which it may be distinguished. Co. Litt. 286 *b*; 3 Black. Com. 152; 25 Arms. 74, note 1 *b*.

Judgment reversed, and cause remanded, with leave to amend, etc.

But these averments do not exhaust the declaration. How much of what remains is surplusage; how much is necessary fiction? The answer may be found in the following:—

#### EVOLUTION OF THE DECLARATION IN DETINUE.

##### (a) *The Fiction of Bailment.*

Anciently in detinue the count must allege a bailment. This averment was substantive. Thus (hypothetical), *A. v. X. Detinue sur bailment.* A. bails a chattel to M., from whom it is wrongfully taken by X. (or by whom it is wrongfully sold or bailed to X.). “This action will not lie against the third hand.” A. has no action against X.; “his only action is against M.”<sup>1</sup> Anciently, too, since the allegation of bailment was a substantive averment, a traverse of the bailment was an answer to the action. Per Louther, J., “The cause of your action [of detinue] is the bailment, and at the time of the bailment she could not bind herself. Judgment if now she ought to answer of a thing for which she could not bind herself.”<sup>2</sup>

Later, after the scope of the action became enlarged, the allegation of bailment degenerated into a mere fiction, and the traverse of the bailment became an immaterial traverse. In *Gledstane v. Hewitt*,<sup>3</sup> Bayley, B., said, “Thus, the authorities seem to show, that though a bailment is stated in the declaration, it is not an essential part of the declaration, and that the plaintiff may or may not, at his elec-

<sup>1</sup> 2 Pollock and Maitland, 174.

<sup>2</sup> Y. B. 20 and 21 Edw. I. 189.

<sup>3</sup> 1 Cr. and J. 565 (1831).

tion, in his replication, make the terms of the delivery material; but it is for him only to do so; and he is not tied down to the species of bailment stated in his declaration: and if he can make out that he was entitled to the possession and redelivery of the goods, and that the defendant wrongfully withheld them, he will be entitled to recover."

(b) *The Passing of the Fiction of Bailment. Growth of the Fiction of Finding in Detinue.*

The more modern precedents in detinue, however, omit the allegation of bailment, and substitute an averment of finding. Whence came this averment? According to a recent eminent writer,<sup>1</sup> the fiction of finding instead of bailment in detinue was reached by gradual steps.

First, the action was allowed to be maintained against the executor of the bailee when the property came to his hand. In an interesting case decided in the year 1323,<sup>2</sup> the plaintiff alleged a bailment of a deed to A.; that the deed came to the hands of the defendant after A.'s death; and that the defendant refused to deliver on request. The plaintiff failed because he did not make the defendant privy to A. as heir or executor.

Second, the action was allowed against a person acquiring possession from a bailee, or subsequent to a bailment. The law had changed, and it was good form to count of a bailment to A. and a general *de venerunt ad manus* of the defendant after A.'s death. Per Paston, J., "The count is good notwithstanding he does not show how the deed came to defendant, since he has shown a bailment to B. (the original bailee) at one time." Martin, J. "He ought to show how it came to defendant." Paston, J. "No, for it may be defendant found the deed, and if what you say is law, twenty records in this court will be reversed."<sup>3</sup>

Third, in the year 1371, detinue was said to lie against the finder of property in the absence of any bailment. The

<sup>1</sup> J. B. Ames, *History of Trover*, 11 Harv. L. Rev. 374 *et seq.*

<sup>2</sup> Y. B. 16 Edw. II. 490.

<sup>3</sup> Y. B. 9 Hen. VI. f. 58, pl. 4.

plaintiff brought detinue for an ass, alleging that it had strayed from him to the seignior of the defendant, and that he one month afterwards offered the defendant reasonable satisfaction (for the keep). Issue was joined upon the reasonableness of the tender.<sup>1</sup>

(c) *The Evolution from Substance to Form.*

NOTE IN Y. B. 22 EDWARD I. 467. ANNO 1294.

Gerard de Lisle and Alice his wife *v.* Thomas Malekake and Beatrix his wife.<sup>2</sup> Writ of Admeasurement of Dower.

"Note that where a thing belonging to a man is lost, he may count that he (the finder) tortiously detains it, etc., and tortiously for this that whereas he lost the said thing on such a day, etc., he (the loser) on such a day, etc., and found it in the house of such an one and told him, etc., and prayed him to restore the thing, but that he would not restore it, etc., to his damage, etc.; and if he will, etc. In this case the demandant must prove by his law (his own hand the twelfth) that he lost the thing."

"In detinue it is no plea that *ne baila pas*; for the bailment is not traversable;<sup>3</sup> for he shall answer to the detinue. Br. Detinue de Biens, pl. 50, cites 3 Hen. IV." Viner's Abridgment, Detinue, 33.

"Detinue upon trover [i. e. a finding], the defendant justified for distress of the same goods for rent arrear, judgment *si actio*, and did not answer to the trover, and good *per cur.*, for it is not traversable; but in the case of 27 Hen. VIII. 33 Shelley said in some case trover is traversable, which Fitzherbert expressly denied. Br. Detinue de Biens, pl. 2, cites 27 Hen. VIII. 22." Viner's Abridgment, Detinue, 37.

"In detinue the plaintiff counted upon trover, the defendant justified for pledges upon money lent, and per Brian this is no plea without traversing the trover; for otherwise he does not encounter the plaintiff. *Ibid.* [21 Edw. IV. 55]." Viner's Abridgment, Detinue, 37.

<sup>1</sup> Y. B. 2 Edw. III. f. 2, pl. 5.

<sup>2</sup> Y. B. 22 Edw. I. 461.

<sup>3</sup> Matters of substance are traversable; matters of form are not. *Master and Wardens of the Society of Innholders in London v. Gledhill, Sayer*, 274, reported *post*.

## GLEDSTANE v. HEWITT.

EXCHEQUER OF PLEAS, TRINITY TERM. 1831.

REPORTED 1 CROMPTON AND JERVIS, 565.

In detinue the allegation of bailment is not traversable.

Detinue on bailment of a promissory note, delivered by the plaintiff to the defendant, to be redelivered on request. Averment of a special request.<sup>1</sup>

Plea, that before the exhibiting the bill of the plaintiff, to wit, etc., the plaintiff delivered the said promissory note to, and deposited and lodged the said promissory note with, the defendant, to be by him kept as a pledge and security for the repayment of a certain sum of money, to wit, the sum of £50, then lent and advanced by the defendant to the plaintiff, upon the faith and security of the said promissory note, and which said sum of £50 had not at any time before the exhibiting the bill, etc., been repaid to the defendant, but still remained wholly due and unpaid. By reason whereof, the defendant from thence hitherto detained, and still detains, etc., etc.

Replication, that the plaintiff, after the said depositing and lodging the said promissory note with the defendant, and before the exhibiting the bill, etc., was ready and willing, and then and there tendered and offered to pay to the defendant the said sum of £50, and then and there required the defendant to redeliver up to him the said promissory note, which the defendant then and there wholly refused to do; wherefore, etc., etc.

Special demurrer, showing for cause, that plaintiff had, in his said replication, departed from the declaration, and relied upon a new ground of action, and that the matters alleged in the replication did not support the declaration, but were inconsistent with it.

Lord Lyndhurst, C. B.<sup>2</sup> The question raised by this demurrer is, whether the replication is a departure. The declaration is in detinue, upon a bailment in the ordinary form, to be redelivered on request. We are of opinion that, in the action of detinue, the detainer is the gist of the action, and that the bailment is merely inducement. Otherwise, in the cases where a bailment different from the one in the declaration is stated in the plea, it would have been necessary for the defendant to have traversed the bailment laid in the declaration.

In *Bateman v. Ellman*, it was determined that the bailment laid

<sup>1</sup> There was a second count on a finding.

<sup>2</sup> The judgment of the court in this case was not given until the day next after the argument.

in the declaration was not material. I am therefore of opinion that there is no departure, and that our judgment must be for the plaintiff.

Bayley, B. I am of the same opinion. The declaration states the delivery to the defendant of a certain note, to be redelivered to the plaintiff upon request. Now, the nature of the action of detinue is, that the detainer is the gist of the action.

The plaintiff must make out that he was entitled to the delivery of the article, and that the defendant wrongfully detained it; and if he can do that, he has done all that is necessary to maintain his action. He is not bound to show the circumstances under which the article came into the defendant's hands. It may come into the defendant's hands by bailment, by pledge, which is a species of bailment, by finding, or by other means. The action of detinue is an action of wrong, and it is only necessary to prove so much as is material; and the question in this case is, whether the allegation, that the note was to be redelivered on request, is essential to entitle the plaintiff to recover in this case. \* The defendant pleads, what in substance amounts to this, that the note was delivered on pledge; namely, that he was to hold it until the plaintiff paid him £50, which is a different bailment from that stated in the declaration. If the declaration is to be considered as binding the plaintiff to a contract to redeliver on request, the defendant's plea should have concluded with a traverse; it should have stated that the note was delivered by way of pledge, and have traversed that it was delivered to be redelivered on request. That would have been essential, if the bailment in the declaration were material; but the authorities show that such a traverse is not the common course of pleading; and the defendant must show such a delivery as will give him a continuing right to withhold the article. If the plaintiff means to insist, that the article was not delivered on the terms mentioned in the plea, he is at liberty, in his replication, so to do; but it is not for the defendant to tie him down to the bailment stated in the declaration by a traverse. If the plaintiff does not mean to deny the terms, which are stated in the plea, he may show that, even upon those terms, the defendant has no right to withhold. Therefore, to a plea of this description, the plaintiff has the option to deny the species of delivery on which the defendant insists, or to show such circumstances as, admitting the delivery, establish that the defendant is guilty of a wrongful detention. As it seems to me, that is clearly to be deduced from the case of *Bateman v. Ellman*, and the other authorities on the same point. In *Bro. Detinue de Biens*, pl. 50, it is said: "In detinue, it is no plea that plaintiff did not bail as laid, for the bailment is not traversable, and the defendant shall answer to the detinue." So, *Dyer*, fol. 29 *b*, in detinue for forty quarters of wheat, the plaintiff declared simply on a contract for wheat, etc.; the defendant pleaded, that the plaintiff bought of him eighty quarters, upon condition,



that, when plaintiff came for the wheat, he should pay immediately, or otherwise the whole to be void; and further, that the plaintiff had received thirty quarters, and paid him for them; and at another day came and received ten quarters, and had not paid for them, so that the contract became void; thus, not traversing the contract as stated in the declaration, *simpliciter*, but going on to state circumstances which would justify him in withholding the corn. Then the question was raised, whether the defendant ought not to have concluded his plea with a traverse, because it was said, the plaintiff states an unconditional contract, which binds the defendant to deliver, at all events, and the defendant says it is a conditional contract. No, said the court, that ought to come from the plaintiff. If the plaintiff mean to insist that there was not such a contract as that stated in the plea, but such as his declaration implies, he should state it in his replication. Now, that case shows that the statement in the declaration is not a statement which binds the plaintiff, but that he is at liberty, afterwards, to answer the plea of the defendant. The defendant must show that the bargain stated by him justifies him in that which is the gist of the action, the detainer; and then the plaintiff is at liberty to deny the contract as the defendant states it, or to show (that being the true contract) that there is a wrongful detention on the part of the defendant. *Bateman v. Ellman* is exactly analogous to that case which I have mentioned from *Dyer*. The plaintiff declared *simpliciter* on a bailment to the defendant of plate, to be redelivered on the 17th May: on a plea of *non detinet*, which put the whole of the declaration in issue (as it seems to have been considered in *Mills v. Graham*, 1 N. R. 140), the jury found specially, that the goods were bargained and sold to the defendant by indenture, on a condition, that, if the plaintiff paid such a sum upon the 17th May following, the bargain should be void, and they found that the money was paid on that day. No doubt that was a finding of a delivery on different terms from those stated in the declaration; but the court said it was well enough, for, the condition being performed by payment of the money, the plaintiff ought to have the goods again, and then the detention is a tort. That case, as it seems to me, shows that the plaintiff is not tied down to the terms of bailment stated in his declaration. In the case of *Kettle v. Bromsall*, the plaintiff declared on a bailment to be safely kept, the defendant said, they were delivered to me to be kept as my own proper goods, and I was robbed. That would have constituted an excuse; the loss would fall not on the defendant, but on the owner of the goods. Now, if the allegation of the delivery to be safely kept was a traversable allegation, the defendant was bound by the rules of pleading to have traversed it; but it is the plaintiff who denies the allegation that he delivered the antiques to be kept as the defendant's own goods; and on demurrer the court held the replication good, because the traverse was taken on

the material part of the plea, and the loss by the plaintiff would or would not be an excuse, according to the terms of the bailment, whether to be safely kept or to be kept as the defendant's own. Therefore, that case, as it seems to me, is consistent with the others, and, instead of being an authority for the defendant, is an authority for the plaintiff. The case of *Mills v. Graham* is a case in which it is impossible to say that the court came to anything like a judicial decision upon the present point. The first count in that case was on a bailment to redeliver on request; the second count was on a finding; it turned out in evidence that the goods were delivered in order that the defendant might do certain work upon them; and Lord Chief Justice Mansfield, on the trial, thought that the goods had not been delivered on the terms stated in the first count, but that the plaintiff was entitled to a verdict upon the second count. It was immaterial whether he had a verdict on the count upon the bailment or on that upon the trover. On an application to enter a nonsuit, the question whether the particular delivery stated was essential to be proved, was much discussed at the bar, but not by the court. Lord Chief Justice Mansfield by no means gives an opinion that the plaintiff was bound to prove the delivery as alleged. He says, "No case has been cited to prove that where the detention is wrongful, the declaration may not always be supported upon an allegation of finding; though perhaps in cases of special bailments it may be fit to require that the plaintiffs should declare specially, yet I will not say that it is necessary even in these cases." Mr. Justice Chambre, that very able pleader, "would not say whether a special bailment ought to be set forth or not, and whether such bailment might be traversed, but was far from saying that it might."

Thus, the authorities seem to show, that though a bailment is stated in the declaration, it is not an essential part of the declaration, and that the plaintiff may or may not, at his election, in his replication, make the terms of the delivery material; but it is for him only to do so; and he is not tied down to the species of bailment stated in his declaration: and if he can make out that he was entitled to the possession and redelivery of the goods, and that the defendant wrongfully withheld them, he will be entitled to recover.

Vaughan, B. I am of the same opinion. In *Bro. Ab.*, title "Charter de Terres & Detinue de Eux," pl. 22, there is an authority to show that the bailment is not a material allegation.

Bolland, B. I concur with the rest of the court. A departure must be in something material. *Lee v. Rogers*, 1 Lev. 110. The gist of the action of detinue is the detainer, and it does not appear to me that the allegation which the defendant says has been departed from is material.

Judgment for the plaintiff.<sup>1</sup>

<sup>1</sup> Arguments of counsel and observations of the court thereon are here omitted.  
—Ed.

This decision was followed in *Walker v. Jones*, 2 C. & M. 672; and it has since been decided that the new rule which confines the plea of *non detinet* to a simple denial of the detainer makes no difference in respect to this point: the common bailment is, still, not traversable: *Whitehead v. Harrison*, 6 Q. B. 423, 431; *Clossman v. White*, 7 C. B. 43. In the last case, *Wilde, C. J.*, says: "In *detinue*, the gist of the action is the detainer: the bailment is altogether immaterial, — in the sense of being traversable; it is like the allegation of the loss, in a count in *trover*. The plaintiff may allege any bailment he pleases."

The declaration in *detinue*, therefore, contains, in addition to purely substantive averments, a fictitious allegation

- (a) Of a bailment, or
- (b) Of a losing and finding.

### REPLEVIN.

The following is a valid declaration under the Practice Act of Massachusetts.

And the plaintiff says, "that the said defendant, on the       day of       , took seventy-one barrels of flour branded 'Harrison,' and forty-four barrels of flour branded, 'How, How,' goods of the said plaintiff, and them unlawfully detained; to the damage of the plaintiff, as he says, in the sum of       dollars." *Oliver's Precedents*, 556.

The following is from the reports of Sir Edmund Saunders.

"SUFFOLK. } Henry North, late of Mildenhall, in the said County, es-  
to wit, } quire, was summoned to answer John Potter of a plea,  
wherefore he took a horse, called a nag,<sup>1</sup> of him the said John, and  
unjustly detained him against sureties and pledges, etc. And where-  
upon the said John, by Edward Coleman, his attorney, complains, that  
the said Henry, on the 18th day of June, in the 19th year of the reign  
of our said lord Charles the Second, now king of England, at Milden-  
hall aforesaid, in a certain place there, called the Fenn, took the said  
horse of him the said John, and unjustly detained him against sureties  
and pledges, until, etc.; wherefore he the said John says that he is  
worse, and has damage to the value of £40; and therefore he brings  
suit, etc.

"[*Plea of cognizance.*] And the said Henry North by Francis Woodward his attorney comes and defends the wrong and injury when, etc., and as bailiff of one Sir Henry North, baronet, well acknowledges the taking of the said horse in the said place in which, etc. and justly, etc. because he says that the said place called the Fenn, in which the taking of the said horse is above supposed to be done, contains, and at the said time of the taking of the said horse did contain in itself a

<sup>1</sup> This description seems sufficient. 2 *Williams' Saunders*, 74 b, note.

thousand acres of pasture with the appurtenances in Mildenhall aforesaid, whereof a certain place called the Delfe, containing a hundred acres of pasture with the appurtenances, next adjoining to a certain other place there called the Brincke on the south side, is, and at the said time when, etc. and also from time whereof the memory of man is not to the contrary, was parcel; which said hundred acres of pasture with the appurtenances are, and at the said time of the taking of the said horse, were the proper soil and freehold of the said Sir Henry North, baronet. And because the said horse of the said John Potter, at the said time when, etc. was in the said hundred acres of pasture with the appurtenances, eating up the grass there growing, and doing damage there to the said Sir Henry North, baronet, he the said Henry the now defendant, as bailiff of the said Sir Henry North, baronet, and by his command, at the said time when, etc. took and distrained the said horse in the said hundred acres of pasture with the appurtenances so as aforesaid doing damage there, etc.; and this he is ready to verify: wherefore he prays judgment, and a return of the said horse, together with his damages, costs, and charges by him about his suit in that behalf expended, according to the form of the statute in such case lately made and provided, to be adjudged to him, etc." From the case of *Potter v. North*, 1 Saunders' Rep. 350.

#### DECLARATION IN THE DETINET AND DETINUIT.<sup>1</sup>

"ss.: W. Burton, of L. Chaplain, and B. W., were summoned to answer unto J. J. of a plea wherefore they took the Cattel of him the said J. J. and then unjustly detained against the sureties and pledges, etc. And whereupon the said J. J., by J. C., his attorney, complaineth that the said W. and B. the day, etc., in the year, etc., In the Town of H. in a certain place called —, they took four score sheep of him the said John, and seventy sheep thereof they unjustly *detained*<sup>2</sup> until, etc. And ten sheep residue there of of the price of twenty shillings as yet unjustly *detain* against the sureties and pledges, etc. Whereupon he saith that he is the worse, and hath damage to the value of £20, and thereupon he bringeth his suit and prayeth that the said W. and B. may secure the delivery of the said 10 sheep unto him, etc."

"It [replevin] is either in the *detinet* or *detinuit*. Where the sheriff delivers the goods to the plaintiff the declaration is in the *detinuit*, and the plaintiff recovers only damages for the detention. In such case, if the defendant recover, there is a general verdict for the defendant and damages for the detention, on which there is a

<sup>1</sup> Small's Declarations, Replevin, 34; McKelvey, 49.

<sup>2</sup> "The distinction between the so-called action of replevin in the *detinuit* and that in the *detinet* was never anything but a distinction in form, and when it became impracticable to make the distinction it became obsolete." McKelvey, Pleading, 50.

judgment *per retorno habendo* and for the damages. *Eastman v. Worthington*, 5 Serg. & R. 130. Where the goods are not delivered to the plaintiff, but are allowed to remain in the defendant's possession upon his claim of property and giving bond for their forthcoming, or where the goods have been eloiigned, the declaration is in the *detinct*. The plaintiff recovers the value of the goods in damages; or, if the defendant recovers, it is by a general verdict in his favour. *Bower v. Tallman*, 5 Watts and Serg. 556." — Sharswood, 3 Blackstone's Commentaries, 146, note.

"To show a good cause of action in replevin the declaration should contain :

"(a) A statement of the plaintiff's right.

"To show the plaintiff's right, all that need be alleged is that the goods, specific recovery of which is sought, were in the plaintiff's possession at the time of the wrongful taking. The right not to have them interfered with being a natural right follows as a matter of course, and need not be alleged. [In the modern declaration in replevin, at least, it is usual to describe the goods sufficiently for identification, and to state their value.]

"(b) A statement of the violation of the right by the defendant, i. e. a statement of the wrongful taking and detention."

"[(c) Damages.] McKelvey, Common-Law Pleading, 53.

## TRESPASS.

### (1) *Trespass to Person.*

The following is a valid declaration under the Practice Act in Massachusetts :

"And the plaintiff says the defendant made an assault upon him, and struck him on his head, and kept him imprisoned for the space of one day." Public Statutes, Massachusetts, c. 167, p. 979.

The following is a valid declaration at common law :

"Warwickshire } Be it remembered, that heretofore, to wit, in the  
to wit. } term of Easter last past, before our lord the king, at  
Westminster, came Thomas Lawe by Charles Ballett, his attorney, and

brought here into the court of our said lord the king, then there, his certain bill against Thomas King, in the custody of the marshall, etc., of a plea of trespass; and there are pledges of prosecution, to wit, John Doe and Richard Roe, which said bill follows in these words, to wit: Warwickshire, to wit; Thomas Lawe, gent., complains of Thomas King, being in the custody of the marshall of the marshalsea of our lord the king, before the king himself, for that he on the 1st day of April, in the 18th year of the reign of our lord Charles the Second, now king of England, etc., at the borough of Warwick, in the said county, with force and arms, etc., did make an assault upon him the said Thomas Lawe, and did then and there beat, wound, imprison, and illtreat the said Thomas Lawe, and detained and kept him in prison without any reasonable cause, against the will of him the said Thomas Lawe, and against the law and custom of this realm of England, for a long time, to wit, for the space of two days, and other wrongs to him then and there did, against the peace of our said lord the now king, and to the damage of the said Thomas Lawe of £40; and therefore he brings suit, etc.” From *Lawe v. King*, 1 Saunders’ Rep., 76.

#### FORMAL ALLEGATIONS PECULIAR TO THE TRESPASSES.

“The writs of trespass are closely connected with the appeals for felony. The action for trespass is, we may say, an attenuated appeal. The charge of *felonia* is omitted; no battle is offered; but the basis of the action is a wrong done to the plaintiff in his body, his goods, or his land, ‘by force and arms against the king’s peace.’ In course of time these sonorous words will become little better than a hollow sound; there will be trespass with force and arms if a man’s body, goods, or land have been unlawfully touched. From this we may gather that the courts had never taken very seriously the ‘arms’ of the writ, or fixed a minimum for the force that would beget an action.” 2 Pollock and Maitland, 525.

#### MELWOOD v. LEECH.

IN THE KING’S BENCH. 1701.

REPORTED 1 LORD RAYMOND, 38.

Trespass. The words *contra pacem* were omitted in the declaration, and therefore after execution of a writ of inquiry judgment was arrested upon motion. But Holt, Chief Justice, seemed to incline that it would have been good after verdict.

“In the statement of the trespasses, the words ‘with force and arms’ (*vi et armis*) should be adopted, though the only mode of

taking advantage of the omission is by special demurrer: and in common pleas, when the words appear in the recital of the supposed writ, and not in the count part, it is sufficient; and in one case Lord Holt said, that these words might be omitted; and there is an express legislative provision to this effect in regard to indictments." 1 Chitty, Pleading, 387.

## BENSON v. BACON.

SUPREME COURT, INDIANA. 1884.

REPORTED 99 INDIANA, 156.

Elliott, J.<sup>1</sup> The first paragraph of the complaint seeks to recover for injuries resulting from an assault and battery alleged to have been committed upon the appellee by the appellant. The objection urged to this paragraph of the complaint is that it does not employ the word "unlawful" in charging the assault and battery. The approved precedents do not contain the word unlawful or its equivalent, and we are not willing to hold the complaint bad because of the omission to use this term. 2 Works, Pr. 645; 2 Chitty, Pleading, (13 Am. ed.) 852; Bullen & Leake, Prec. 411; Oliver, Prec. 719; 1 Estee, Pl. 560. It is true that in indictments it is necessary to use the term unlawful or its equivalent, but it is well known that there is an essential difference between civil actions and criminal prosecutions. Howard v. State, 67 Ind. 401. If, however, we are in error in yielding to the authority of the precedents which have so long ruled pleaders, we should still be compelled to hold the pleading good. The reason for this is that the facts specifically pleaded show that the assault and battery was an unlawful one. Bloom v. Franklin Life Ins. Co., 97 Ind. 478; Norris v. Casel, 90 Ind. 143.

(2) *Trespass De Bonis Asportatis.*

The following is a valid declaration at common law.  
(No form is presented in the Massachusetts statute.)

(a) *For the total destruction of a chattel.*

Derbyshire, } Be it remembered, that heretofore, to wit, in Easter  
to wit. } term last past, before our lord the king at Westminster,  
came George Wright by Francis Gregg, his attorney, and brought here  
into the court of our said lord the king then there, his certain bill

<sup>1</sup> A part of the opinion is omitted.

against Ralph Ramscot in the custody of the marshal, etc., of a plea of trespass; and there are pledges of prosecution, to wit, John Doe and Richard Roe, which said bill follows in these words, to wit; Derbyshire to wit, George Wright complains of Ralph Ramscot, being in the custody of the marshal of the marshalsea of our lord the king, before the king himself, for that he, on the first day of April, in the 17th year of the reign of our lord Charles the Second, now king of England, etc., with force and arms, did so grievously beat, strike, and with a certain knife stab, a mastiff dog of him the said George, of the price of 100 s. at Castleton aforesaid, in the county aforesaid, then and there being found, that by reason thereof, the said mastiff died, and other wrongs to him did, against the peace of our said lord the now king, and to the damage of him the said George of £10, and therefore he brings suit, etc. From *Wright v. Ramscot*, 1 Saunders' Rep., 84.

(b) *For the asportation of a chattel.*

✓ "In trespass for taking and carrying away the plaintiff's goods, it is absolutely essential to state that the goods were the plaintiff's goods; the plaintiff's title to recover rests on that point, and the omission is not cured by a verdict. But if the defendant's plea shows that the goods were in the possession of the plaintiff, the declaration will be aided.

"The goods must be set forth with certainty in the declaration, so that the defendant may be able to justify; or, in case of a recovery against him, to plead it in bar of another action for the same goods.

"The value of the goods should be mentioned. The omission to state the value of the goods is aided by a verdict; but uncertainty in specifying the goods is not." *Oliver's Precedents*, 298.

BURSER *against* MARTIN; *vel* PURSER *against* WALTER.

IN THE KING'S BENCH. 1604.

REPORTED CRO. JAC. 46.

Trespass. *Quare equum cepit à personâ* of the plaintiff, The defendant pleaded Not Guilty, and it was found against him. An exception was taken in arrest of judgment, because he doth not say *equum suum*, or that he was taken from the plaintiff's possession; for otherwise it may be that the plaintiff had not any cause of action, if he had not property or possession; and it may be, for anything which appears in this declaration, that he had not any of them; wherefore the declaration is not good.



Gawdy, Fenner, and Yelverton were of that opinion; and that the declaration cannot be aided by intendment, but ought to be certain.

Popham and Williams, *è contra*; because it being alleged *quod cepit à persona*, it is necessarily to be intended that he had possession. Wherefore, etc. But notwithstanding, afterwards, upon a second motion for the reasons aforesaid, it was adjudged for the defendant.<sup>1</sup>

The declaration in trespass *de bonis asportatis* contains

1. A general description of the chattels, and the facts constituting the plaintiff's title and right to possession, or an allegation of the plaintiff's actual possession at the time of taking.
2. A taking by the defendant with force and arms.
3. Damages for the taking.
4. Conclusion against the peace.

### (3) *Trespass to Land.*

The following is a valid declaration under the Practice Act of Massachusetts :

“And the plaintiff says the defendant forcibly entered the plaintiff's close (describing it), and ploughed up the soil, etc.” Public Statutes, Massachusetts, c. 167, p. 979.

The following is a valid declaration at common law :

Derbyshire, } Be it remembered, that heretofore, to wit, in Easter  
to wit. } term last past before our lord the king at Westminster,  
came Henry Mellor, gent., by Alured Motteram, his attorney, and brought here into the court of our said lord the king, then there, his certain bill against Edward Walker, of Derby, in the county of Derby, gent., in the custody of the marshal, etc., of a plea of trespass, and there are pledges of prosecution, to wit, John Doe and Richard Roe, which said bill follows in these words, that is to say, Derbyshire, to wit, Henry Mellor, gent., complains of Edward Walker, of Derby, in the County of Derby, gent., being in the custody of the marshall of the marshalsea of our lord the king, before the king himself, for that he, on the 1st day of April, in the 21st year of the reign of our lord

<sup>1</sup> This case was rightly decided. — ED. “The plea of every man shall be construed strongly against him that pleadeth it, for everie man is presumed to make the best of his owne case; *ambiguum placitum interpretari debet contra proferentem.*” Co. Litt. 303 b. The attempted averment of possession is also argumentative.

Charles the Second, now king of England, etc., with force and arms, broke and entered the close of him the said Henry, called Littlefield, at Derby, in the county of Derby, and with his feet in walking, and with his certain cattle, to wit, horses, bulls, oxen, cows, swine and sheep, eat up, trod down, and consumed his grass to the value of 40 s. then and there lately growing, and other wrongs to him did against the peace of our said lord the now king, and to the damage of him the said Henry of £20, and therefore he brings suit, etc. From *Mellor v. Walker*, 1 Saunders' Rep. 339.

The declaration in trespass *quare clausum fregit* contains :

1. A description of the property sufficient for identification, particularly as to the county in which the land is located.
2. An allegation of plaintiff's actual possession thereof at the time of the entry.
3. Entry by defendant with force and arms.
4. Damages for the entry.
5. Conclusion against the peace.

## CASE.

### FOR INJURY TO PLAINTIFF'S REPUTATION.

"The king's court [in ancient times] gave no action for defamation. This in our eyes will seem both a serious and a curious defect in the justice that it administered. What is usually counted the first known instance of such an action comes from the year 1356,<sup>1</sup> and even in that instance the slander was complicated with contempt of court. [The words were, "Treitour, felon, robber."] In 1295<sup>2</sup> a picturesque dispute between two Irish magnates had been removed to Westminster, and Edward I.'s court declared in solemn fashion that it would not entertain pleas of defamation; in the Irish court battle had been waged. At the end of the middle ages we may see the royal justices beginning to reconsider their doctrine and to foster 'an action on the case for words.'" 2 Pollock and Maitland, 536.

<sup>1</sup> Lib. Ass. f. 177, pl. 19 (30 Edw. III.).

<sup>2</sup> Rot. Parl. i. 133: "*et non sit usitatum in regno isto placitare in curia regis placita de defamacionibus.*" But words of shame were punishable in the local courts. 2 Pollock and Maitland, 537.

*Slander.*

The following is a valid declaration under the Practice Act of Massachusetts :

“ And the plaintiff says that the defendant publicly, falsely, and maliciously accused the plaintiff of the crime of perjury, by words spoken of the plaintiff substantially as follows. (Here set forth the words — no innuendoes are necessary.)

“ If the natural import of the words is not intelligible without further explanation, or reference to facts understood but not mentioned, or parts of the conversation not stated, in either of those cases, after setting forth the words, the declaration should contain a concise and clear statement of such things as are necessary to make the words relied on intelligible to the court and jury in the same sense in which they were spoken. The rule is applicable to actions for written and printed, as well as oral, slander.” Public Statutes, Massachusetts, c. 167, p. 979.

The following is a declaration in slander at common law.

**FOR WORDS CHARGING A SINGLE WOMAN WITH INCONTINENCE, SPECIAL DAMAGE, LOSS OF MARRIAGE.**

For that whereas, the plaintiff now is a virgin and a chaste woman, and from the time of her nativity hath been so, and hath been accounted, esteemed, and reputed as such among her neighbors, as well as of good reputation and fame by all other good people, and hath all her lifetime continued untouched and unsuspected of the atrocious crimes of adultery or fornication, or any such other enormous crimes ; whereby many good people have, at sundry times, desired to take the said plaintiff to be their wife, and in particular one C. C., who, at the time of speaking the false and scandalous words hereafter mentioned, was lawfully outpublished to the said plaintiff. Nevertheless, the said E., though well knowing the premises, but contriving maliciously and wickedly to injure and defame the plaintiff in her good name and reputation, and to bring her to disgrace and infamy, and to deprive her of her marriage with said C. C., and to subject her to the penalties and punishments provided by law in cases of adultery and fornication, on, etc., at, etc., in presence of divers good people of this Commonwealth, did loudly and publicly speak, utter, and repeat the following false, malicious, and scandalous words of and concerning the plaintiff, to wit, “ that she (meaning the plaintiff) was a whore to a man that courted her ” (i. e. the plaintiff) ; and other further malice,

did then and there, in presence of divers good people, falsely and maliciously publish and declare, "that she (meaning the plaintiff) had a husband in Ireland;" and of her further malice, on, etc., at, etc., in the presence and hearing of divers good people, did pronounce, utter, and publish the following false and scandalous words, to wit, "that her sister's apparition (meaning the apparition of the sister of the plaintiff) appeared to me (meaning the said E.) that night before, and told me (meaning the said E.) that she (meaning the plaintiff) was a damned whore, and that she (meaning the plaintiff) had lodged with her brother (meaning the said E.'s brother) that night;" by means of which false, scandalous, and malicious words, so spoken and published, the plaintiff hath fallen into disgrace, contempt, and infamy with several persons with whom previously she was in great esteem; and also the said C. C., who had solicited her in marriage, and to whom she was outpublished as aforesaid, hath since neglected and utterly refused to marry her, the plaintiff, and still continues so to do; whereby the plaintiff hath not only lost her credit and reputation, but hath also lost her preferment in marriage, etc. Oliver, *Precedents*, 500.<sup>1</sup>

### CASE OF SLANDER.

IN THE COMMON PLEAS. 1587.

REPORTED OWEN, 30.

Brook said that if a man speak many slanderous words of another, he who is slandered may have an action on the case for any one of these words, and may omit the others.<sup>2</sup>

### JONES v. HERNE.

IN THE COMMON PLEAS. 1759.

REPORTED 2 WILSON, 87.

Action of slander for these words, viz. "You (meaning the plaintiff) are a rogue, and I (meaning the defendant) will prove you a rogue, for you forged my name." No special damage was laid in the declaration; there was a verdict for the plaintiff upon Not guilty; and it was now moved by Serjeant Nares in arrest of judgment, that these words are not actionable; to prove which he cited 3 Leon. 231, pl. 313, where the words, "Thou hast forged my hand," were held not actionable. But *per totam curiam*, the saying a man is a forger, or has forged one's hand, is actionable; and they overruled this case in 3 Leon. Willes, C. J., also said that if it was now

<sup>1</sup> The statement of the requisites of this declaration is omitted. From the following cases, the student may determine them.

<sup>2</sup> Part of Brook's observation is omitted.

Any one of the words is sufficient to support the action

*res integra*, he should hold that calling a man a rogue, or a woman a whore, in public company, were actionable.

Judgment for the plaintiff.

JOHNSON *v.* SIR JOHN AYLMER.

IN THE KING'S BENCH. 1605.

*Inductament*  
*Colloquium*  
*Innuendo.*

REPORTED CROKE'S JAMES, 126.

*M. K*  
*Innuendo often in*  
*Colloquium in the*

Action; for that the defendant *hæc falsa et scandalosa verba sequentia dixit et publicavit*, viz. "Mr. Price, you do my Lord Burleigh wrong, that you do not apprehend Jeremy Johnson," *innuendo* the plaintiff, "for a felon, and seize his goods; for he" *innuendo* the plaintiff, "hath stolen a sheep from Wright, of Rirsby," *innuendo* John Wright.

The defendant pleaded not guilty; and found against him, and damages assessed to £50.

After verdict, it was moved in arrest of judgment that the words are too generally laid to maintain the action; for they are not alleged to be spoken of the plaintiff in the writ or count; but only in reciting the words he saith, *innuendo* the plaintiff; and the *innuendo*, without expressly alleging the words to be spoken of the plaintiff, will not maintain the action.

And the court was of that opinion; wherefore it was adjudged for the defendant.

GARFORD AND HIS WIFE *v.* CLERK AND HIS WIFE.

IN THE COMMON PLEAS. 1598.

REPORTED CROKE'S ELIZABETH, 857.

Words "of the following tenor."

Action; for that the defendant's wife spake of the wife of the plaintiff *quædam falsa et scandalosa verba, quorum tenor sequitur in hæc verba*, "Thou art an arrant whore, and an old worm-eaten jade, and one of thy sides hath been eaten out with the pox." The defendants pleaded not guilty, and found against them. And it was moved in arrest of judgment that the words should not maintain an action; and that the declaration was not good, because it is not an express allegation that she spake the same words.

And for this cause the whole court held the declaration to be ill; for something might be omitted in the *quorum tenor*, etc., which was within the words, which would cause the words not to be actionable; and though it be an usual course to plead a deed or record *cujus tenor*, etc., that is because the deed or record might be

viewed whether it agrees with the recital. Wherefore the judgment was stayed. But as to the words themselves, the court held them to be actionable.

### HEMMINGS v. GASSON.

IN THE QUEEN'S BENCH. 1858.

REPORTED ELLIS, BLACKBURN, AND ELLIS, 346.

#### Colloquium.

Action for libel and slander. The first count of the declaration stated that the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say: "What do you think of my job? I am satisfied who it was got into my shop, as George Hearmon tells me that he met Hemmings (meaning the plaintiff) and his son about four o'clock the morning my shop was broken into: I found part of a letter on the floor of my shop, which was in the handwriting of Hemmings;" meaning, by the false and malicious words aforesaid, that the plaintiff had forcibly and with a strong hand broken and entered the defendant's shop, and had wilfully and maliciously, and within three calendar months then last past, cut, damaged, and destroyed the defendant's property in the said shop, to wit, household furniture of the defendant, contrary to the statute in such case provided, and had committed criminal offences punishable by law.

Plea, Not guilty. Issue thereon.

The jury returned a verdict for the plaintiff: damages, £40.

Ballantine, in last Hilary term, obtained a rule to show cause why the judgment should not be arrested on the ground that the innuendo was unsupported by the words and writing.

Parry and A. Wills now showed cause.<sup>1</sup> It is contended by the other side that that count is bad, in arrest of judgment, inasmuch as there is no colloquium. But that is no longer necessary. The Common Law Procedure Act, 1852,<sup>2</sup> enacts that "in actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient."

<sup>1</sup> Before Lord Campbell, C. J., Coleridge, Erle, and Crompton, Js.

<sup>2</sup> 15 & 16 Vict. c. 76.

Lord Campbell, C. J. Upon the first point, in arrest of judgment, we are all agreed that § 61 of the Common Law Procedure Act, 1852, and the two forms in schedule (B.) to that act, enable the pleader to put any construction he pleases upon the words complained of, by *innuendo*; and that it is for the jury to say whether the words were spoken with such meaning.

### BARHAM v. NETHERSALL.

IN THE QUEEN'S BENCH. 1602.

REPORTED YELVERTON, 22.

The plaintiff declared that whereas, etc., the defendant such a day spoke these words: T. Barham (*innuendo* the plaintiff) hath burnt my barn (*innuendo* my barn at such a place full of corn) and that with his own hand; and upon *non culp.* pleaded, it was found for the plaintiff, and alleged in arrest of judgment that the action did not lie; for these words, the plaintiff hath burnt my barn, are no slander; for such burning of an house is but a trespass, and all one as if he had said, the plaintiff hath cut down my trees, and such like; for to say a man has committed a trespass is no slander; and then the *innuendo* (my barn full of corn) will not help the matter; for it is the nature of an *innuendo* to explain doubtful words, where there is matter sufficient in the declaration to maintain the action. But if the words before the *innuendo* do not sound in slander, no words produced by the *innuendo* will make the action maintainable; for it is not the nature of an *innuendo* to beget an action. And all this was allowed by Gawdy and Yelverton, justices (being alone in the King's Bench), and judgment *quod nil capiat per billam*.

### TINDALL v. MOORE.

IN THE COMMON PLEAS. 1758.

REPORTED 2 WILSON, 114.

This was an action of slander, upon several sets of words spoke by the defendant of the plaintiff; verdict for the plaintiff upon the first and fifth sets of words, damages 40 s. The first set were these, That rogue Jo. Tindall (meaning the plaintiff) that set the house on fire (meaning the summer-house that was burnt, in the occupation of one Mr. Cotton), and if anybody will give me charge of him, I will carry him to New Prison. — The fifth set of words were these: Jo. Tindall (meaning the plaintiff) set the house on fire, (meaning the same house).

It was now moved in arrest of judgment that the latter set of words were not actionable, for that every count in a declaration is a substantive count, and the *innuendo* (meaning the same house) shall not relate to the summer-house mentioned in the first set of words.

*Per curiam.* Although the latter set of words be not of themselves actionable, yet they shall have relation to the former set; and we must take them to have been spoken maliciously, as the jury have found for the plaintiff.

Judgment for plaintiff. Davy for the defendant, Nares for the plaintiff.

### CASTLEMAN v. HOBBS.

IN THE QUEEN'S BENCH. 1594.

REPORTED OWEN, 57.

In an action of the case for saying, Thou hast stolen half an acre of corn, (*innuendo*) corn severed, the defendant demurred upon the declaration.

Fenner. It is not a felony to move<sup>w</sup> grain and take it away.

Popham agreed to it, and that the word *innuendo* would not alter the case, unless the precedent words had vehement presumption, the corn was severed; and in this case no man can think that the corn was severed, when the words are, half an acre of corn; on the contrary, if the words had been, that he had stolen so many loads or bushels of corn: and Gawdy was of the same opinion, and judgment against the plaintiff, etc.

*If corn stood it was not a felony but a trespass  
" " was in stacks it was a " "*

### BROWNE v. BRINKLEY.

IN THE QUEEN'S BENCH. 1594.

REPORTED OWEN, 58.

In an action of the case for words; the declaration was, that the plaintiff was produced as a witness before the justices at the Assises at Darby, where he deposed in a certain cause, and the defendant said, Browne was disproved before the Justices of Assise at Darby, before Mr. Kingsley (*innuendo*) that he was disproved in his oath, that he took before the justices; and adjudged against the plaintiff, for although he was disproved in his oath, yet it is not actionable in this case, for that disproof might be in any collateral matter, or any circumstances; but otherwise if the words had been, that he was perjured, and the (*innuendo*) will not help the matter, and so it was adjudged. The Chief Justice and Fenner being only in the court.



BEAVOR *v.* HIDES.

IN THE COMMON PLEAS. 1765.

REPORTED 2 WILSON, 300.

Essentials of a declaration upon the words, "He was put in the round-house for stealing ducks at Crowland."

Action for scandalous words ; five sets were laid in the declaration, and upon the general issue, there was a general verdict for the plaintiff upon the whole declaration ; one of the sets of words were these, viz. He (meaning the plaintiff) was put into the round-house for stealing ducks at Crowland, which were alleged to be spoken of the plaintiff by the defendant falsely and maliciously. And it was moved in arrest of judgment that the words were not actionable, for the defendant doth not say expressly that he stole the ducks, like the case in Cro. Eliz. 234. "I have served thee with the Queen's letter for stealing goods in my mother's house," were held not actionable. "Thou art a false knave, thou wast arraigned for two bullocks," held not actionable. Cro. Eliz. 279, and it was said if the words had been, "Thou art a false knave, thou wast arraigned for stealing two bullocks," these words would not have been actionable, for a man may be arraigned for felony, and yet no felon. "James Steward is in Warwick gaol for stealing a mare and other beasts ;" after verdict the whole court gave their opinion *seriatim*, that these words would not bear an action, for they do not affirm directly that he did steal the beasts. Hob. 177.

In answer, it was said for the plaintiff that these words are alleged to be falsely and maliciously spoken of the plaintiff by the defendant, and the jury have found that they were so maliciously and falsely spoken, like the case in Cro. Car. 268. "He was arraigned at Warwick for stealing of twelve hogs, and if he had not made good friends it had gone hard with him ;" *ubi re verâ* he never was arraigned for felony. After a verdict, these words were held to be actionable, being laid to be spoken falsely and maliciously. "Thou art a clipper, and thy neck shall pay for it ;" after a verdict held actionable, though the word clipper be ambiguous. Skin. 183. "You are a rogue, and broke open a house at Oxford, and your grandfather was forced to bring over £40 to make up the breach," held actionable, though the word rogue is not ; and breaking open a house is only a trespass. Skin. 364. "He was sent to prison for running wool," held to be actionable by Lee, C. J., at Guildhall ; "He was whipt about Taunton castle for stealing sheep," were held actionable. 1 Ro. Abr. 50, pl. 9.

This motion in arrest of judgment was made in Michaelmas term last, when the court thought the cases cited for the defendant were in point, that these words are not actionable.

Lord Camden said, If we should judge these words actionable, many actions would arise at every assizes in the kingdom, where the common topic of conversation is, that such a man was sent to gaol for such a crime, and such a one was arraigned, and tried, etc., etc., and if such words are true, where is the slander, saying, "a man was whipt," if the words are true is no slander.

Bathurst, Justice, also inclined to think the words were not actionable, but thought that if this particular set of words were not proved at the trial, the *postea* (upon the judge's certificate that they were not proved) might be amended, and a verdict for the defendant entered as to this set of words, if any precedent for it could be found; for he said, if they were not proved, the plaintiff ought not to have had a verdict upon them; but if this cannot be done, he thought the cases cited for the defendant so strongly in point that the court were bound by them. Gould, Justice, was of the same opinion, and said the case in Hob. 177, was so strong for the defendant, and so solemnly determined, that he could not well go over it.

Lord Camden (in answer to Mr. Justice Bathurst) said it would be very dangerous after a verdict of twelve men recorded by the court to refer to the judge's notes, in order to alter it; and he thought there was no precedent of such a case, and that a verdict cannot be varied. And the court at this time pronounced that the judgment must be arrested, unless cause the last day of the term (Hilary term last). But at that day they adjourned it for further consideration; and after having taken time till this term, the court changed their opinion, and gave judgment for the plaintiff, that the words were actionable.

Lord Camden. Upon considering this case more fully, we are now all of opinion that these words, being laid in the declaration to be spoken falsely and maliciously of the defendant, are actionable; we must take it upon this record that the plaintiff was really not put in the round-house or imprisoned for stealing of ducks, because the jury have found that the words were falsely spoken; the words clearly import that the plaintiff had been guilty of a crime, and if the fact had been true the defendant might and ought to have justified; if we should arrest the judgment, the malevolent would think the plaintiff had been guilty of the crime falsely imputed to him, and the good-natured could not help suspecting him to have been so. We lay great stress upon the word false; if words are true, they are no slander, but may be justified. The objection here is, that the words do not expressly allege that the plaintiff stole ducks; but words are to be taken according to the common parlance, and to be spoken in the worst sense according to the common understanding of the bystanders. Cro. Jac. 154. "I know what I am, I know what Snell is, I never buggered a mare;" it was objected these words were not actionable, for they do not charge the plaintiff with buggery; but the court said they

implied a charge of buggery, and gave judgment for the plaintiff. 2 Lev. 150. The words in the present case must be taken to be false, and to throw a stain upon the plaintiff's character.

Judgment for the plaintiff *per totam curiam*.

# VILLERS v. MONSLEY.

IN THE KING'S BENCH. 1768.

REPORTED 2 WILSON, 403.

The allegation of malice.

Action upon the case against the defendant for maliciously writing and publishing a libel upon the plaintiff in the words following, viz.:

"Old Villers, so strong of brimstone you smell,  
As if not long since you had got out of hell,  
But this damnable smell I no longer can bear,  
Therefore I desire you would come no more here;  
You old stinking, old nasty, old itchy old toad,  
If you come any more, you shall pay for your board,  
You'll therefore take this as a warning from me,  
And never more enter the doors, while they belong to J. P.  
" *Wilncoat*, December 4, 1767."

The defendant pleaded Not guilty; a verdict was found for the plaintiff and sixpence damages, at the last assizes for the county of Warwick. And now it was moved by Serjeant Burland in arrest of judgment that this was not such a libel for which an action would lie; that the itch is a distemper, to which every family is liable; to have it is no crime, nor does it bring any disgrace upon a man, for it may be innocently caught or taken by infection; the small-pox or a putrid fever are much worse distempers; the itch is not so detestable or so contagious as either of them, for it is not communicated by the air, but by contact or putting on a glove, or the clothes of one who has the itch; and although it be an infectious distemper, yet it implies no offence in the person having it, and therefore no action will lie for saying or writing that a man has got the itch. It is not like saying or writing that a man has got the leprosy, or is a leper, for which an action upon the case will lie, because a leper shall be removed from the society of men by the writ *de leproso amovendo*. 1 Ro. Abr. 44; Cro. Jac. 144; Hob. 219, although it be a natural infirmity.

Wilmot, Lord C. J. I think this is such a libel for which an action well lies; we must take it to have been proved at the trial that it was published by the defendant maliciously; and if any man deliberately or maliciously publishes anything in writing con-

cerning another which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action well lies against such publisher; I see no difference between this and the cases of the leprosy and plague; and it is admitted that an action lies in those cases. The writ *de leproso amovendo* is not taken away, although the distemper is almost driven away by cleanliness, or new invented remedies; the party must have the distemper to such a degree before the writ shall be granted, which commands the sheriff to remove him without delay *ad locum solitarium ad habitandum ibidem prout moris est, ne per communem conversationem suam hominibus dampnum vel periculum eveniat quovismodo*. The degree of leprosy is not material, if you say he has the leprosy it is sufficient, and the action lies; the reason of that case applies to this; I do not know whether the itch may not be communicated by the air without contact, it is said to be occasioned by *animalcula* in the skin, and must be cured by outward application; nobody will eat, drink, or have any intercourse with a person who has the itch and stinks of brimstone, therefore I think this libel actionable, and that judgment must be for the plaintiff.

Clive. I am of the same opinion, that this is a very malicious and scandalous libel.

Bathurst, J. I wish this matter was thoroughly gone into, and more solemnly determined; however, I have no doubt at present but that the writing and publishing anything which renders a man ridiculous is actionable.<sup>1</sup>

Gould, J. What my brother Bathurst has said is very material; there is a distinction between libels and words; a libel is punishable both criminally, and by action, when speaking the words would not be punishable in either way; for speaking the words rogue and rascal of any one an action will not lie; but if those words were written and published of any one, I doubt not an action would lie; if one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another, and publish them maliciously, as in the present case, I have no doubt at all but the action well lies; what is the reason why saying a man has the leprosy or plague is actionable; it is because the having of either cuts a man off from society; so the writing and publishing maliciously that a man has the itch and stinks of brimstone cuts him off from society. I think the publishing anything of a man that renders him ridiculous is a libel and actionable, and in the present case am of opinion for the plaintiff. Judgment for the plaintiff *per tot' cur.* without granting any rule to show cause.

<sup>1</sup> Part of Bathurst's opinion is omitted.

**MERCER v. SPARKS.**

IN THE KING'S BENCH. 1586.

REPORTED OWEN, 51.

Mercer had judgment to recover against Sparks in the common pleas, upon an action of the case for words; and Sparks brought a writ of error in the king's bench, and assigned for error that the plaintiff did not express in the declaration that the defendant spoke the words *malitiose*, but it was adjudged that it was no error, because the words themselves were malicious and slanderous, wherefore judgment was affirmed.

**WIRRAM'S CASE.**

REPORTED NOY, 116.

In an action upon the case for words (*viz.*), If ever man was perjured, Wirram was. And issue upon not guilty, it is found for the plaintiff; and it was moved in arrest of judgment, because that the plaintiff hath not averred that any man was perjured. And by Tanfield only in court, that judgment shall be stayed. For by him it hath been adjudged, that for words, "Thou art as very a thief as any in Gloucester Gaol," is not actionable without averment that there was a thief in Gloucester Gaol. And the reason is, because theft and perjury are such bad things in themselves, that they shall not be intended without an averment, etc.

**PRIDAM v. TUCKER.**

REPORTED NOY, 133.

An action upon the case was brought for words, Thou art an healer of felonies, and adjudged maintainable, because in Devonshire where, etc., healer signifies the same as hider or concealer. And the proverb there is, the healer is as bad as the stealer.

**MALICIOUS PROSECUTION.**

MALICIOUS PROSECUTION ON A CHARGE OF ENDEAVORING TO EVADE  
PAYMENT OF RAILROAD FARE; UNDER MASSACHUSETTS  
PRACTICE.

And the plaintiff says the defendant, maliciously devising to injure the plaintiff, did falsely and maliciously and without any reasonable or probable cause procure the plaintiff to be complained against by their

servants and agents for the alleged crime of evading fare due to the defendants for carrying the plaintiff as a passenger on the defendants' railroad.

And the plaintiff says that pursuant to a warrant issued on said complaint he was arrested and imprisoned for the space of one day.

And the defendants did falsely and maliciously and without any probable cause prosecute and aid in prosecuting said complaint against the plaintiff, until afterwards on the       day of       the defendant was after trial acquitted by said court and by a judgment thereof, of the premises charged against him by said complaint.

By reason of which false and malicious prosecution and imprisonment the plaintiff has been compelled to undergo great labor and trouble and expense and pain of body and mind, has suffered greatly in his credit, business, and reputation, and has expended large sums of money in his defence, etc.

CHARLES U. BELL.

JOHN E. COLLINS *v.* EDWARD T. CAMPBELL.

SUPREME COURT, RHODE ISLAND. DECEMBER 13, 1894.

REPORTED 18 RHODE ISLAND, 738.

Requisites of declarations for malicious prosecution.

Trespass on the case for malicious prosecution.

*Per curiam.* We think the demurrer to the declaration in this case should be sustained. The declaration nowhere alleges, except in an argumentative way, that the malicious proceeding of which the plaintiff complains had terminated in his favor before the commencement of this action. In *Lauzon v. Charroux*, 18 R. I. 467, which is relied on by the plaintiff's counsel in support of the declaration, it was held, in accordance with the well-settled rule in such cases, that in order to entitle the plaintiff to recover in an action of this sort "three things must concur, viz. 1, the motive of the party instituting or prosecuting the suit or proceeding must have been malicious; 2, the suit or proceeding complained of must have been instituted without probable cause; and 3, the suit or proceeding must have terminated in the plaintiff's favor;" and also that the declaration must contain allegations covering each of these points. See also *King v. Colvin*, 11 R. I. 582; *Newton v. Weaver*, 13 R. I. 617; *Gorton v. De Angelis*, 6 Wend. 418; *Clarke v. Cleveland*, 6 Hill, 344.

Demurrer sustained.

<sup>1</sup> Oliver, *Precedents*, 524.

## NEGLIGENCE.

## FOR KEEPING A FEROCIOUS STAG; UNDER MASSACHUSETTS PRACTICE.

And the plaintiffs say the defendant kept a certain stag, well knowing him to be of a ferocious disposition, and accustomed to attack mankind; that the defendant negligently suffered said stag to roam without being properly guarded or confined; that the said stag, while so negligently unguarded and unconfined, ferociously attacked the plaintiff's said intestate, and wounded and maimed him, from which attack and injuries he suffered great fear and agony, and died; that by reason of said attack and injuries a right of action against the defendant accrued to said intestate, which right of action has survived to the plaintiffs. Oliver, Precedents.

REPORTED DYER, 29 A. (195).

Note, by all the judges; if my dog pursue and chase the sheep of a stranger, or kill them without my incitement, and trespass be brought upon this, defendant may clearly plead not guilty.

BOULTON *v.* BANKS.

IN THE KING'S BENCH. 1632.

REPORTED CRO. CAR. 254.

Action upon the case. Whereas the defendant kept a mastiff, *sciens* that he was *affuetus ad mordendum porcos*, and that the plaintiff was possessed of a sow great with pigs, that the said mastiff bit the said sow so as she died of the biting.

After verdict upon not guilty pleaded, it was moved in arrest of judgment, first, That the recital of the bill is in a plea of trespass, and the declaration is in a plea of trespass on the case. *Sed non allocatur.*

The second exception, That to declare of a dog *ad mordendum porcos assuetus* is not good, for it is proper for a dog to hunt hogs out of the ground, and his biting of the hogs is necessary, and not like to the keeping of a dog which usually bites sheep or other cattle.

But the court, *absente* Richardson, conceived the action well lies, for it is not lawful to keep dogs to bite and kill swine. Wherefore it was adjudged for the plaintiff.

BUXENDIN *v.* SHARP.

IN THE COMMON PLEAS. 1701.

REPORTED 2 SALKELD, 662.

The plaintiff declared that the defendant kept a bull that used to run at men; but did not say, *sciens* or *scienter*, etc. This was held naught after a verdict; for the action lies not unless the master knows of this quality; and we cannot intend it was proved at the trial, for the plaintiff need not prove more than is in his declaration.<sup>1</sup>

HANNAH POPPLEWELL *v.* EDWIN PIERCE.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1852.

REPORTED 10 CUSHING, 509.

Declaration for keeping a ferocious animal.

This was an action of trespass on the case. The declaration alleged "that the defendant, heretofore, to wit, on the 26th day of January last past, and from thence, for a long space of time, to wit, until and at the time of the damage and injury to the said plaintiff, as hereinafter mentioned, to wit, at Lawrence aforesaid, wrongfully and injuriously did keep a certain horse which was, during all that time, used and accustomed to attack and bite mankind; he, the said defendant, during all that time, well knowing that the said horse was used and accustomed to attack and bite mankind, to wit, at Lawrence aforesaid; and which said horse, afterwards and whilst the said defendant so kept the same as aforesaid, to wit, on the 28th day of January last past, at Lawrence aforesaid, did attack and bite the said plaintiff, and did then and there greatly lacerate, hurt, wound, and bruise the back of the said plaintiff, and thereby she the said plaintiff then and there became sick, sore, lame, and disordered, and so remained and continued for a long space of time, to wit, the space of seven weeks then next following, and still continues sick, sore, lame, and disordered thereby; during all which time the said plaintiff thereby suffered and underwent, and still suffers and undergoes, great pain, and was thereby then and there, and still is, hindered and prevented from performing and transacting her lawful affairs and business by her to be performed and transacted; and also, by means of the premises, she, the said

<sup>1</sup> Another report of the same case. — *Baynterie v. Sharp*. In the Common Pleas, Easter Term, 1696.. Reported Nelson's Introcyche, 33. Case against defendant for keeping a mad bull which wounded the plaintiff. He had a verdict, but the judgment was arrested because it was not alleged that the defendant did know the bull to be mad.



plaintiff, was thereby and still is, put to great expense, cost, and charges, in the whole amounting to a large sum of money, to wit, seventy dollars, in and about endeavoring to be cured of the said wounds, sickness, lameness, and disorder, so occasioned as aforesaid, and hath been and is, by means of the premises, otherwise greatly injured and damnified, to wit, at Lawrence aforesaid, to the damage," etc.

The case was tried in the Court of Common Pleas before Perkins, J., and after verdict returned for the plaintiff, the defendant moved that judgment should be arrested for insufficiency of the plaintiff's declaration. This motion was overruled, and the case thereupon brought into this court on exceptions.

Metcalf, J. The reason assigned by the defendant for his motion in arrest of judgment is, that the declaration does not allege "that the horse attacked and bit the plaintiff, by reason of the defendant's having wrongfully and injuriously kept the same;" and, therefore, for aught that the declaration avers, the injury received by the plaintiff may have been by her own fault or carelessness, and not by the fault or carelessness of the defendant. But we are of opinion that there is no defect in the declaration, and that the objection to it mistakes the ground of the action. This question has recently been decided by the courts in England. In a case in the Queen's Bench, *May v. Burdett*, 9 Adolph. & Ellis, N. R. 101, the action was for an injury received from an animal accustomed to bite mankind. It was objected, after verdict for the plaintiff, that the declaration did not allege negligence or default in the defendant in not properly keeping or securing the animal. Lord Denman said: "A great many cases and precedents were cited upon the argument, and the conclusion to be drawn from them appears to us to be that the declaration is good upon the face of it, and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing and taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities. The precedents, both ancient and modern, with scarcely an exception, merely state the ferocity of the animal and the knowledge of the individual, without any allegation of negligence or want of care." "The negligence is in keeping such animal after notice." "It may be that if the injury was solely occasioned by the wilfulness of the plaintiff, after warning, that may be a ground of defence by plea in confession and avoidance." This decision was made in Trinity Term, 1846. During the same term the Court of Exchequer made the same decision. *Jackson v. Smithson*, 15 Mees. & Welsb. 563. These two decisions were fully recognized by the Court of Common Pleas, in 1848. *Card v. Case*, 5 Man. Grang. & Scott, 622. In this last case, which was for an injury received from a dog, the declaration,

besides alleging what is contained in the declaration now before us, also alleged that "it was the duty of the defendant to use due and reasonable care and precaution in and about the keeping and management of the said dog; yet that the defendant, not regarding the duty of him, the defendant, in that behalf, did not use such due and reasonable care," etc. This allegation was held to be immaterial. Coltman, J., said: "Looking at the frame of this declaration, it may be said that the negligently keeping the dog was the wrongful act charged; but that is overlooking that which is the gist and substance of the action. It is clear from the case of *May v. Burdett*, where the matter underwent very great consideration, that the circumstance of the defendant's keeping the animal negligently is not essential; but that the gravamen is the keeping of a ferocious animal knowing its propensities, and the consequent injury to the plaintiff." And Maule, J., said: "The cases of *May v. Burdett* and *Jackson v. Smithson*, and the general course of precedents and authorities referred to in the former case, prove that the wrongful act is the keeping a ferocious dog, knowing its savage disposition; and that an action of this sort may be maintained without alleging any negligence. The declaration here idly and superfluously states a duty to arise on the defendant's part, to use due and reasonable care and precaution in and about the keeping and management of the dog." "The injury to the plaintiff would be the same whether the defendant was guilty of negligence or not." See also *Kelly v. Wade*, 12 Irish Law Reports, 424.

The defendant's motion is overruled, and the plaintiff will have Judgment on the verdict.

### LUTHER A. MAY *v.* INHABITANTS OF PRINCETON.<sup>1</sup>

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1846.

REPORTED 11 METCALF, 442.

In Massachusetts, there must exist in a valid declaration in tort for negligence, some sort of allegation of the plaintiff's due care.

This was an action of trespass upon the case, on the Rev. Sts. c. 25, s. 22, to recover damages alleged to have been occasioned to the plaintiff by an encumbrance in a highway which the defendants were by law obliged to repair. The declaration averred that said highway, on the 14th of March, 1844, and for the space of twenty-four hours next preceding, was defective, unsafe, and out of repair, and dangerous to travellers, by reason of being blocked up and obstructed by snow; of which defects and want of repair, the defendants, before that day, had reasonable notice; "and the plaintiff, on said 14th of March, was passing and travelling in and upon said highway, with his team employed to transport the mail on

<sup>1</sup> Cf. *Hilton v. Boston*, 171 Mass. 478, explaining *May v. Princeton*.

said highway, and by reason of the defects and want of repair aforesaid, one of his horses was severely coked, receiving a deep wound in one of the hind legs, and suffered great injury ; and the plaintiff was thereby hindered and detained for a long space of time, and was put to great cost and expense, in care and attention to said wound, and was wholly deprived of the valuable services of said horse, for a long space of time."

At the trial in the Court of Common Pleas, before Merrick, J., the plaintiff offered evidence tending to show that he was travelling in a proper manner, and in the exercise of ordinary care and diligence, at the time of the alleged accident. The defendants objected to the admission of this evidence, on the ground that there was no allegation of these facts in the plaintiff's declaration. This objection was overruled, and the evidence was admitted. The jury found a verdict for the plaintiff, and the defendants alleged exceptions to the admission of this evidence.

Shaw, C. J. In an action upon the case against a town, on the statute, the defendants objected to the admission of evidence tending to show that the plaintiff was driving with due care, because there was no specific averment to that effect in the declaration. Undoubtedly the rule of law is a sound one, that the *probata* must conform to the *allegata*, and that evidence cannot be given of facts not alleged. But the mode of averment is regulated by judicial practice, generally too well settled to be called in question. Under a count for money had and received, for instance, a great variety of facts may be given in evidence, of which the declaration gives no intimation.

In the present case, the court are of opinion, that the declaration is sufficient to admit the proof offered. To maintain this action, the plaintiff is bound to prove affirmatively, not only that the highway was defective, but that his loss was caused by that defect. The *per quod* is of the essence of the charge, and must be strictly proved. Though the highway be ever so defective, if the plaintiff has suffered no loss by reason of such defect, he has no cause of action. *Lane v. Crombie*, 12 Pick. 177 ; *Smith v. Smith*, 2 Pick. 621.

When a traveller on the highway has broken down, it is obvious that this may be attributed to either one of two causes ; viz. his own negligence, or the defect in the highway. Proof, which negatives the one, tends to establish the other, as the true and sole cause. This is the ground of the decisions, cited in the argument, to prove, as they do most fully, that the plaintiff must show that he was driving with due care. It is to negative carelessness, and prove that the accident was occasioned exclusively by the defect in the highway. The plaintiff therefore may give affirmative

proof that he was driving with due care, because it establishes his main averment, and the one on which his right of action must rest, namely, that his loss was occasioned by reason of the defect in the highway. Even if this were an irregularity and defect in the declaration, we think it would be within the authority of that class of decisions in which it has been held, that a case, if defectively stated, is aided by verdict, because the court will presume that the requisite proof to support the case was given at the trial. *Worster v. Canal Bridge*, 16 Pick. 541. If no sufficient case is stated in the declaration, the defendant has his remedy in a demurrer, or motion in arrest of judgment, and not excepting to evidence.

Exceptions overruled.

X

[*Extract from*]

SMITH v. THE EASTERN RAILROAD.

SUPREME JUDICIAL COURT, NEW HAMPSHIRE. 1857.

REPORTED 35 NEW HAMPSHIRE, 356.

While in New Hampshire this is unnecessary.

*Copy of Declaration.*

“In a plea of trespass on the case, for that whereas the said plaintiff, at Seabrook aforesaid, on the 11th day of September, in the year of our Lord one thousand eight hundred and fifty one, was possessed and the owner of a certain black mare, of the value of one hundred and fifty dollars, which said black mare, on the day and year last aforesaid, at Seabrook aforesaid, was on the railroad track of the said defendants leading from Boston to the State of Maine, passing through Seabrook aforesaid; and whereas, then and there, on the same day, at Seabrook aforesaid, the said defendants were possessed of certain cars, and also of a certain locomotive engine, propelled by steam, drawing the same cars on and over said railroad track; and the said defendants, then and there, by an engineer, then a servant of the said defendants, had the care, government, and direction of the said cars and locomotive engine: yet the said defendants, not minding or regarding their duty in this behalf, then and there, by their said engineer, then a servant of the said defendants, so negligently and unskilfully managed and behaved themselves in this behalf, and so ignorantly, carelessly, and negligently managed and guided the said cars, and the locomotive engine propelled by steam, drawing the same as aforesaid, that the said cars, for want of good and sufficient care and management

thereof, and of the locomotive engine, propelled by steam, drawing the same, then and there struck against the said black mare of the said plaintiff, being upon the track as aforesaid, with such force and violence that the said black mare was bruised, wounded, cut in pieces, and totally destroyed."

Per Fowler, J. . . . We have thus far proceeded on the assumption that there might have been some imperfection or defect in the declaration under consideration, that would have been fatal on demurrer. A careful examination of the question, however, satisfies us that no such defect existed upon its face. It charged the defendants with carelessly and negligently killing the plaintiff's horse upon their track by means of their train. Upon principle and weight of authority we think it quite clear that a good cause of action was thus set forth. It was not necessary for the plaintiff to set forth how the horse came upon the track, or that it was there without his fault. If it were there wrongfully, the defendants were responsible, if they killed it, as expressly charged, through carelessness and negligence. If it were there rightfully, the fact of its being killed was competent *prima facie* evidence of the negligence of the defendants in managing their train. If it were there through the fault of the defendants, they were responsible for the damages, under whatever circumstances they killed it. The declaration was therefore sufficient of itself, although it might have been more perfect. If any defect existed, it was latent. It was only when the evidence showed that the horse came upon the track through the negligence of the defendants in not maintaining their fence, so that it became unnecessary to prove the negligence expressly charged in the management of their train, that any objection could have been taken to the declaration. Had the defendants then insisted upon a variance between the declaration and the proof, as before suggested, the plaintiff might have been obliged to amend, or have been subjected to a nonsuit. But it is not now necessary to decide the question or further discuss the subject. Had the objection been taken and insisted upon, the plaintiff, upon the facts in the case, would undoubtedly have proposed and been permitted to amend, probably without terms, by inserting an allegation that the horse was upon the track through the fault of the defendants in not maintaining their fence, so that no particular inconvenience to the plaintiff or advantage to the defendants could have resulted therefrom. As it was not insisted upon, as the declaration was sufficient of itself, and clearly good after verdict, notwithstanding the variance in the proof, there must be

Judgment on the verdict.

BOWLUS *ET AL.* v. BRIER *ET AL.*

SUPREME COURT OF INDIANA. 1882.

REPORTED 87 INDIANA, 391.

Black, C. This was an action commenced before a justice of the peace by the appellees against the appellants, the complaint alleging, in substance, that the defendants hired of the plaintiffs, who were keepers of a livery stable, a team of two horses and a buggy, to be driven by the defendants from the town of Williamsport to the city of Crawfordsville, a distance of twenty-eight miles; that pursuant to said hiring the plaintiffs intrusted said team and buggy to the defendants, for said use; that said horses, while so in possession of defendants, were by them, or by others, with their permission, so unlawfully neglected and abusively driven and cared for that they were greatly injured, and rendered wholly unfit for use in the business of the plaintiffs for the space of three weeks, to the damage of the plaintiffs \$50; and that the market value of said team was by said abuse and negligence greatly impaired, to the damage of plaintiffs \$100; and judgment was demanded for \$150. . . .

The objection urged against the complaint is that it does not allege the plaintiffs were without fault, and that the horses were able to perform the journey.

An averment of want of contributory fault on the part of the plaintiff is necessary only where the action is for negligence, without any direct, positive, affirmative fault on the part of the defendant. *Roll v. City of Indianapolis*, 52 Ind. 547; *Coon v. Vaughn*, 64 Ind. 89. The complaint before us contained such a charge of positively improper conduct on the part of the defendants as to render unnecessary the averment suggested by appellants. . . . We find no available error in the record.<sup>1</sup>

*Per curiam.* It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

<sup>1</sup> Part of the opinion, not relating to the sufficiency of the complaint, is omitted.

**THE EVANSVILLE AND CRAWFORDSVILLE RAILROAD  
COMPANY v. HIATT.**

SUPREME COURT OF INDIANA. 1861.

REPORTED 17 INDIANA, 102.

While in Indiana an allegation of due care is ordinarily vital.

Appeal from the Sullivan Circuit Court.

Perkins, J. Hiatt sued the Evansville and Crawfordsville Railroad Company, to recover damages occasioned by an injury he received from the cars on said road, and recovered a judgment for \$1200. The company has appealed to this court. The complaint, in the case, does not aver that the plaintiff was not in fault, but it alleges that he, for the purpose of rescuing his father, jumped upon the railroad track, with full knowledge of the nearness and speed of the train, his father, old and infirm, having also entered upon, and started up the track, immediately in front of the approaching train. This is plain, from the averment that he was met by the train almost immediately after he entered upon the track. [The court then reviewed the evidence at length.]

The sufficiency of the complaint in this case has been discussed. In this class of suits, the plaintiff must, as a general proposition, prove that the proximate, the immediate, cause of the injury sued for was the wrongful act of the defendant, to which injury his own wrongful act did not immediately contribute; at least, the facts must develop this. Hence the question of negligence, on the part of the plaintiff, arises under the general denial. It is embraced in the issue made by such denial. 1 Hilliard on Torts, p. 133. Hence, the further rule as to the complaint, that it must show by averments that the plaintiff was not in fault. The complaint in this case, as will appear from what we have said upon the facts, does not sufficiently excuse the plaintiff. *The President, etc., v. Dusouchett*, 2 Ind. 586; *The Wayne, etc., Turnpike Co. v. Berry*, 5 Ind. 286. Our statute makes railroad companies liable for killing stock, but not men, without regard to negligence, where the road is not fenced.<sup>1</sup>

*Per curiam.* The judgment is reversed, with costs, for want of a sufficient complaint. Cause remanded for further proceedings, with leave to amend, etc.

John P. Usher, for the appellant.

J. E. McDonald and A. L. Roache, for the appellee.

<sup>1</sup> Part of the opinion, not relating to the sufficiency of the complaint, is omitted.

To show a good cause of action in case, if the injury be to the plaintiff's person or property, the declaration should contain

- (a) A statement of the wrongful act on the part of the defendant.

If the injury be to the plaintiff's property, the declaration should further contain

- (b) A statement of such facts as will show that the plaintiff has some interest in the property which may be the subject of injury. The word property here is used in the broad sense as including both chattels, real estate, choses in action, and anything which is of value, or from which plaintiff rightfully enjoys a benefit.

[(c) Damages.]

Adapted from McKelvey, Common-Law Pleading, 62.

PRESENTED TIDD'S PRACTICE, VOL. I., PAGE 390.

"In actions for wrongs, the declaration should state the injury complained of; and in actions on the case it should set forth, by way of inducement, the circumstances under which the injury was committed, and the consequential damages resulting therefrom to the plaintiff. The injury complained of is immediate or consequential. Where it is immediate, and included in the act complained of, there it is sufficient to state that act alone in the declaration, as in trespass *vi et armis*. The charge in such case ought to be direct and positive, and not merely by way of recital. Therefore a declaration by bill, stating that whereas, or wherefore the defendant did the act complained of, is bad on special demurrer; and was formerly holden to be so, in arrest of judgment; but now it may be amended at any time before or after judgment, by a right bill; the time of filing whereof the court will not inquire into. And by original, the count-part being helped by the recital of the writ, this fault is not fatal, even on a special demurrer.

"Where the damages in trespass are such as naturally arise from the act complained of, or cannot with decency be stated, they may be given in evidence under the *alia enormia*; but otherwise they must be stated in the declaration. And many things may be laid in aggravation of damages, for which alone trespass would not lie; as trespass may be brought for entering the plaintiff's house, and



beating his wife, child, or servant: but in such case, the plaintiff cannot recover damages for losing the service of his child or servant, because he may have a proper action for that purpose, nor can it be given in evidence; but the beating may be given in evidence, to aggravate the damages: for now, though it has been holden otherwise formerly, if the principal matter will bear an action, the plaintiff may give anything in evidence in aggravation of damages, that will not of itself bear an action, for if it will, it must be shown; as in trespass *quare clausum fregit*, the plaintiff would not be permitted to give evidence of the defendant's taking away a horse, etc., but in trespass *quare clausum et domum fregit*, he may give in evidence that the defendant came into his house, and defiled his daughter.

"Consequential injuries, we have seen, arise from malfeasance, nonfeasance, or misfeasance. In actions for malfeasance, three things are to be attended to in the declaration: first, the motive, if any, which urged the defendant to the commission of the act complained of; secondly, the end which he had in view; and thirdly, the means which he took of accomplishing it. Thus, in an action for defamation, the motive is malice, the end proposed is to injure the plaintiff in his good name, etc., and the means are the words spoken by the defendant for that purpose. In actions for malfeasance, the motive is either malice, which, generally speaking, leads to the commission of injuries to the person, or the gratification of self-interest at the expense of another. And accordingly, the end which the defendant has in view is either to injure the plaintiff, or to benefit himself. And the means he takes of accomplishing his intention are either direct and open, or under color of legal process, or by deceit, which is either where there is a privity between the parties, as upon a sale of goods, etc., or where there is no such privity. In actions for nonfeasance or misfeasance, the injury frequently proceeds from a mere neglect, without any bad motive imputable to the defendant.

"The circumstances attending the several injuries before mentioned, and which should be stated by way of inducement, are various, according to the nature and grounds of the action. In general, they disclose some right or title in the plaintiff, or some duty to be performed by the defendant. In actions for wrongs affecting the absolute rights of persons, the right to personal security, being implied, need not be stated in the declaration; as in actions of assault and battery, etc. But where the wrongs complained of affect the relative rights of persons, the relation should be stated, in respect of which the plaintiff is injured; as in actions

for criminal conversation, etc. And where an action is brought for defamation, it is usual to state in the declaration, by way of inducement, that the plaintiff is a person of good name, etc., and has not been guilty of the crime imputed to him.

“In actions for wrongs to real or personal property, the plaintiff’s right or title must be set forth in the declaration, either generally or specially. Where a special title is necessary to maintain the action, it must be stated with certainty. If a man allege in himself a title to the inheritance or freehold of lands in possession, he ought regularly to say that he was seised; or if he allege possession of a term for years, or other chattel-real, that he was possessed. So if he allege seisin of things manurable, as of lands, tenements, rents, etc., he should say that he was seised in his demesne as of fee; if of things not manurable, as of an advowson, that he was seised as of fee and right, omitting in his demesne. And it is a rule, that where title is necessary to be shown, if the plaintiff derive a particular estate from another, he ought to show that the other had such an interest as would enable him to make the estate. The reason why the commencement of particular estates must be shown in pleading is, because they are created by agreement out of the primitive estate; and the court must judge whether the primitive estate and agreement be sufficient to produce the particular estate claimed; and this is a fundamental rule, which ought not to be broken upon fancied inconveniences. It is also a rule that if the plaintiff claim under one who has only a particular estate, as for life, he must aver the continuance of that estate.

“In setting forth a title to incorporeal hereditaments, the plaintiff must show that it was by grant, custom, or prescription. A grant ought regularly to be pleaded, with a *profert in curia* of the deed containing it; but where the deed is lost or destroyed, by accident or length of time, it may be pleaded without a *profert*. Custom is properly a local usage, and not annexed to any particular person; such as a custom within a manor, that lands shall descend to the youngest son, or that copyholders shall have a right of common, etc. Prescription is altogether a personal usage; and is either in a *que estate*, or in a man and his ancestors; the former is where the right claimed is annexed to, and passes with the land, in which case the plaintiff states that he, and all those whose estate he hath therein, have immemorially had such right; the latter is where the right is not annexed to the land, but lies in grant, in which case the plaintiff must aver, that he and his ancestors have immemorially enjoyed it.

“But in personal actions, it is seldom necessary to state a title

specially in the declarations ; for damages are the gist of these actions, and the title only matter of inducement. And it is a general rule therein, that possession is sufficient evidence of title against a wrong-doer ; as in trespass *quare clausum fregit*, etc. So in an action on the case for a nuisance to the plaintiff's house, etc., it is sufficient for the plaintiff in his declaration to state generally that he was lawfully possessed of the house, or other property affected by the injury complained of : and if the declaration be for stopping up lights, it goes on to state, that by reason of his possession he had, and of right ought to have, the lights that have been obstructed. In like manner, the plaintiff in an action for diverting a water-course from his mill need only state, that he was possessed of the mill, and that the water had been accustomed and of right ought to flow thereto, without stating that it was an ancient mill, or disclosing the grounds upon which the right to the water is claimed.

“ In an action upon the case for the disturbance of rights of common, etc., there is this distinction : where the action is brought against a wrong-doer, it is sufficient for the plaintiff to state in his declaration, that he was possessed of a house or lands, etc., and by reason of his possession thereof, was entitled to the right, in the exercise of which he has been disturbed ; but where the plaintiff would lay any charge or servitude on the land or property of another, he must set forth his title specially in the declaration. Thus, in an action on the case against a stranger and wrong-doer, for disturbing the plaintiff in the use of a seat in a church, no title or consideration is necessary to be shown ; but where the plaintiff claims against the ordinary himself, who hath *prima facie* the disposal of all the seats in the church, he ought to show some cause or consideration, as building, repairing, etc. And though, in the other case, the plaintiff is allowed to declare upon his possession, yet he must prove his title at the trial ; and possession for above sixty years of a pew in a church is not a sufficient title to maintain an action on the case, for disturbance in the enjoyment of it ; but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration, as appurtenant to a messuage in the parish. In declaring for wrongs to personal property, the plaintiff must state his right ; as in trespass for taking goods, that they were his own goods ; or in trover, that he was possessed of them, etc.

“ In actions upon the case for a breach of duty, the declaration should state the nature of the duty to be performed by the defendant, which is founded on the general obligation of law, the defend-

ant's particular situation, or some contract or agreement between the parties. Where the defendant is liable of common right, as to repair a wall for preventing damage to his neighbor, it is not necessary for the plaintiff to show a title in his declaration, or the special ground of the defendant's liability; but where a charge is imposed on another, against common right, as owner of the soil or tertenant, it was formerly holden, that a title must be shown, as in an action for not repairing fences, etc. So where a special action on the case was brought against the defendant, for not keeping a bull and boar, the declaration was holden bad upon demurrer, for not setting forth that the defendant was obliged to keep them, either by custom, prescription, or otherwise. But in a late case, where an action was brought for not repairing a private road, leading through the defendant's close, it was held to be sufficient to allege, that the defendant, as occupier of the close, was bound to repair it; and per Buller, Justice, the distinction is, between cases where the plaintiff lays a charge upon the right of the defendant, and where the defendant himself prescribes in right of his own estate. In the former case, the plaintiff is presumed to be ignorant of the defendant's estate, and cannot therefore plead it; but in the latter, the defendant, knowing his own estate, in right of which he claims a privilege, must set it forth. In actions against sheriffs or other officers, or against carriers, etc., for misfeasance, the declaration must state the nature of the plaintiff's right, and the ground of the defendant's duty.

"In actions upon the case for consequential injuries, the damages which the plaintiff has sustained, being the gist of the complaint, must be stated in the declaration; which damages must appear to depend on the injury complained of, and not be too remote, or happen from the intervention of another cause; and they are either general or special. General damages are such as naturally arise out of, or are connected with the injury complained of; and in actions for malfeasance, they in general correspond with the end or design which the defendant had in view, and which has been previously stated in the declaration; as in an action for defamation the declaration states, that the defendant intending to injure the plaintiff in his good name, etc., spoke the words complained of; whereby the plaintiff was injured in his good name, etc. Special damages are either such as are superadded to general damages, arising from an act injurious in itself; or such as arise from an act indifferent in itself, but injurious in its consequences; and in either case, they must be specially laid in the declaration, or the plaintiff will not be allowed to give them in evidence at the trial. Thus, in an action for defamation, though the words be in themselves action-

able, yet the plaintiff is not at liberty to give evidence of any loss or injury he has sustained by the speaking of them, unless it be specially laid in the declaration. If an action be brought for words that are not in themselves actionable, and the plaintiff do not prove the special damage laid in the declaration, he must be nonsuited, because the special damage is the gist of the action; but where the words are of themselves actionable if the words be proved, the jury must find for the plaintiff, though no special damage be proved.

"The declaration, in general, concludes, to the damage of the plaintiff of a certain sum of money, and therefore he brings his suit, etc. But in a penal action, brought by a common informer, where the plaintiff's right to the penalty accrues upon bringing the action, it is not necessary to conclude in this way, as the plaintiff cannot have sustained any damage by a previous detention of the penalty. In actions against attorneys and officers of the court, it is usual, though not necessary, for the plaintiff, instead of bringing suit, to pray relief, etc. And where the action is brought by bill against a member of the House of Commons, the bill concludes with a prayer of process to be made to the plaintiff, according to the statute, etc. It was anciently necessary to find pledges to prosecute, and add their names to the declaration by bill; but they are now holden to be mere matter of form, and may be found at any time before judgment.

"The qualities of a declaration are, first, that it correspond with the process; secondly, that it contain all the circumstances necessary to maintain the action, and no more; thirdly, that these circumstances be set forth with certainty and truth."

### STATUTES OF JEOfAILS AND AMENDMENTS.

"The statutes of jeofails and amendments are so called from *j'ay faille*, an expression used by the pleader of former days when he perceived a slip in his proceeding. The statutes of jeofails and amendments are 14 Edw. III. c. 6; 9 Hen. V. c. 4; 4 Hen. VI. c. 3; 8 Hen. VI. c. 12, 15; 32 Hen. VIII. c. 30; 18 Eliz. c. 14; 21 Jac. I. c. 13; 16 and 17 Car. II. c. 8; 4 and 5 Ann. c. 16; 9 Ann. c. 20; 5 Geo. I. c. 13." Stephen, Pleading, App. XXX. Tyler's ed.

JOHN THOMAS *v.* WILLOUGHBY.

MICHAELMAS TERM, 18 JAC. 1. IN B. R.

REPORTED CROKE'S JAMES, 587.

Assumpsit by John Thomas, executor of Nicholas Joyce, against the defendant, for that he promised to the said testator, in consider-

ation that he the said Nicholas the testator would deliver to him on request forty pounds, to repay it on such a day.

The declaration was, "*quod idem Nicholaus dicit in facto, quod ipse idem Nicholaus delivered to him the forty pounds, and that the defendant had not paid it to him in his life, nor to the plaintiff, his executor, after his death, etc.*"

Upon *non assumpsit* pleaded, and found for the plaintiff, it was moved in arrest of judgment that this declaration was ill and insensible, "*quod idem Nicholaus dicit in facto,*" because he is a dead person. And although it was moved, that it might be amended, for it was said to be the default of the clerk only, who put in *prædictus* Nicholaus, where it should have been "*Johannes.*"

Yet it was resolved, it could not be amended; for it is the very substance of the declaration, and no precedent matter to induce thereto. And it is not like where the issue is betwixt John and William, and the issue is joined, *quod idem Joh. hoc petit quod inquiriat*, etc., *et prædictus Johan. similiter*, "where it should be," *prædictus Willielmus similiter*; for it is there merely the default of the clerk, when he had a precedent record of the bar and replication, to guide him how the defendant should join issue,<sup>1</sup> but it is not so here, but merely the default of the plaintiff in his declaration: Wherefore it was adjudged for the defendant, *querens nihil capiat per tillam*.

## STATEMENTS OF CLAIM IN TORT.

### PRESENT-DAY PROCEDURE IN ENGLAND.

A word as to the forms of declarations now in use in England. They are termed "statements of claim."

The Rules of the Supreme Court, 1883, Order XIX. Rule 5, declare: "The forms in Appendices C, D, and E, when applicable, and when they are not applicable forms of the like character, as near as may be, shall be used for all pleadings; and where such forms are applicable and sufficient, any longer forms shall be deemed prolix, and the costs occasioned by such prolixity shall be disallowed to or borne by the party so using the same, as the case may be. The forms here given are taken from Appendix C." Cf. Bigelow, Torts, 2d Camb. ed. 387.

#### 1. *Malicious Prosecution* (No. 15, s. 6).

The defendant maliciously and without reasonable and probable cause preferred a charge of larceny against the plaintiff before a

<sup>1</sup> Cro. Jac. 67, *Burton v. Mandel*.

justice of the peace, causing the plaintiff to be sent for trial on the charge and imprisoned thereon, and prosecuted the plaintiff thereon, at the Middlesex Quarter Sessions, where the plaintiff was acquitted.

Particulars of special damage:—

Messrs. L. & L.'s bill of costs, £65.

Loss in business from January 1st, 1883, to February 18th, 1883, £100.

The plaintiff claims £500.

Place of trial,

(Signed)

Delivered.

## 2. *Trespass* (No. 2, s. 7).

1. The plaintiff is entitled to the possession of Blackacre in the parish of [or, of No. 2, Bridge Street, Bristol] in the county of .

2. On or before the day of , 188 , A. B. was seised in fee and in possession of the premises.

3. On the day of , 188 , the said A. B. died so seised, whereupon —

4. The estates descended to the plaintiff, his eldest son and heir-at-law.

5. After the death of the said A. B. the defendant wrongfully took possession of the premises.

The plaintiff claims:—

(1) Possession of the premises.

(2) Mesne profits from the day of .

Place of trial, .

(Signed)

Delivered.

## 3. *Conversion* (No. 1, s. 6).

The plaintiff has suffered damage by the defendant wrongfully depriving the plaintiff of two casks of oil by refusing to give them up on demand [or, throwing them overboard out of a boat in the London docks, etc.].

[If any special damage is claimed, add.]

Particulars [fill them in].

The plaintiff claims £100.

Place of trial, London.

(Signed)

Delivered.

4. *Detinue* (No. 2, s. 6).

The defendant detained from the plaintiff the plaintiff's goods and chattels, that is to say, a horse, harness, and gig.

The plaintiff claims a return of said goods and chattels or their value, and £10 for their detention.

Place of trial, Lincolnshire.

(Signed)

Delivered.

5. *Fraudulent Sale of Lease* (No. 14, s. 6).

The plaintiff has suffered damage from the defendant inducing the plaintiff to buy the goodwill and lease of the "George" public-house, Stepney, by fraudulently representing to the public that the takings of the said public-house were £40 a week, whereas in fact they were much less, to the defendant's knowledge.

Particulars of special damage:—

[Fill them in.]

The plaintiff claims £ .

(Signed)

Delivered.

6. *Negligent Driving* (No. 3, s. 6).

The plaintiff has suffered damage from personal injuries to the plaintiff and damage to his carriage, caused by the defendant or his servant on the 15th day of January, 1882, negligently driving a cart and horse in Fleet Street.

Particulars of expenses, &c.:—

	£	s.	d.
Charges of Mr. Smith, surgeon,	10	10	0
Charges of Mr. Jones, coach maker	14	5	6
	24	15	6

The plaintiff claims £150.

Place of trial, London.

(Signed)

Delivered.

X



## CHAPTER VII.

### DEMURRERS.

THE purpose of the chapter may be briefly stated. We shall ascertain :

1. The matter admitted by a demurrer.
2. The several kinds of demurrers, and their origin.
3. The effect of demurrers in opening up the record.
4. What are demurrers to evidence and what are special verdicts.

“ An issue of the law, which we call a demurrer, is when admitting the matters alleged either of them resteth in the judgment of the law.” Finch’s Law, c. xl.

A demurrer cometh of the Latin word *demorari*, to abide ; and therefore he which demurreth in law, is said, he that abideth in law : *Moratur* or *demoratur in lege*. Whensoever the learned counsel of a party is of opinion that the count or plea of the adverse party is insufficient in law, then he demurreth or abideth in law, and referreth the same to the judgment of the court. Coke upon Littleton, 71 b.

#### 1. *The Matter admitted by a Demurrer.*

##### THOMPSON *v.* HARVEY.

NEW JERSEY SUPREME COURT, NOVEMBER TERM. 1811.

REPORTED PENNINGTON’S REPORTS, \*894.

This was an action brought on an arbitration bond. The defendant prayed oyer of the condition, and pleaded no award. The plaintiff replied, setting out an award, and assigned a breach ; to this replication the defendant demurred specially, and assigned as cause of demurrer that it did not appear on the award that the arbitrators had been sworn. This fact had been averred in the replication.

Hunter, for the defendant, cited State Reports, 144, 271.

Griffith, *contra*. The act of assembly does not require the oath of the arbitrators to appear in the award; it is sufficient if the fact is averred and proved.

By the court. The cases cited went on the ground that it did not appear on the record that the referees were sworn; facts well pleaded are admitted by the demurrer. We think it sufficiently appears on this record that the arbitrators were sworn.

Judgment for plaintiff.

### COLE v. MAUNDER.<sup>1</sup>

IN THE KING'S BENCH. 1635.

REPORTED IN 2 ROLLE'S ABRIDGMENT, 548.

If one enters my close, and with an iron sledge and bar breaks and displaces the stones on the land, being my chattels, and I request him to desist, and he refuses, and threatens me if I shall approach him; and upon this I, to prevent him from doing more damage to the stones, not daring to approach him, throw some stones at him *mollitor et molli manu*, and they fall upon him *molliter*, still this is not a good justification, for the judges say that one cannot throw stones *molliter*, although it were confessed by a demurrer; and it would be perilous to give men liberty to throw stones in defence of their possession, for when a stone is thrown from the hand, it cannot be guided, and (here) a justification of a battery in defence of possession, although this arises from the possession, still (in) the conclusion is in defence of the person.

Judgment for plaintiff.

### WELLS v. WIGON, ALPORT, ETC.<sup>2</sup>

IN THE COMMON PLEAS. 1671.

REPORTED CARTER, 224.

Trespass for taking of goods in Norwich. One pleads *Non Culp*. The other defendants are two sheriffs and sergeants, and these persons make a justification: (that is to say) that city is an ancient city, and in the time of Hen. IV. incorporated by the name of Bailiff and Commonalty; afterwards by a new name of Mayor and Sheriffs, and that there was an ancient court held there time out of mind to hold pleas in any personal action of any value; and sets forth that

<sup>1</sup> See *Weston v. Carter*, 1 Siderfin, 9, *post*.

<sup>2</sup> The opinions of Vaughn, Chief Justice, Wild and Windham, JJ., are omitted.

Alport, one of these defendants, brought an action in the Town-Court of Norwich upon *insimul computasset* for £14, and allegeth this to be within the jurisdiction of this court. Upon summons went out an attachment to two of the sergeants, and by virtue of this process did attach the goods; and further sets forth that the said Alport, one other of the defendants, did require these two sergeants to execute this process. And demands judgment *si actio*.

The plaintiff replies, after protestation that the goods were not of such a value, he pleads *de injuria sua propria* they took the goods, *absque hoc* that T. Wells the plaintiff did ever account within the jurisdiction of the court, or was found in arrearages, or that he did ever borrow of Alport £14. *Et hoc paratus est verificare*. To this the defendants demur.

The case is :

Five persons are sued for taking of goods. Two say they are sergeants at mace within Norwich, and an attachment comes to them to be served *per bona & catalla* of the plaintiff to appear; and by virtue of this attachment they took these goods. Say the sheriffs, action was commenced within the jurisdiction of our court against this Wells, and as our duty was, we granted out an attachment to take these goods. Saith Alport, I had a suit there against the party, and I desired them to grant out an attachment. And

Baldwin. We conceive this is a good justification, and the traverse in the replication is idle. It is the duty of the sheriffs to justify, the bailiffs are not to question. 10 Rep. Case of the Marshalsea. He doth not induce his traverse, neither doth he tell you where the jurisdiction was. But *absque hoc* the cause was within the jurisdiction of the court. So that the defendant is to make good by this traverse: 1, the right of action; 2, the locality.

Jones, Serjeant, *pro querente*.

By protestation that the goods are not of the value of £80, but he pleads the account was oot [not?—ED.] within the jurisdiction of the court. He hath no time to plead to the jurisdiction now, but to take advantage of the defendant's plea. By the demurrer it appears no account was within the jurisdiction of the court. This, being matter of fact, is confessed.

Baldwin. A demurrer is a confession of everything well pleaded. Our demurrer points to what is idle, and to no purpose.

Ellis, Justice. If the point of jurisdiction be not pleaded well, the demurrer is no confession. Upon a justices they many times sweep away all the goods; but if the party appear, and put in pledges, they are released. *Quære*.

RAINSFORD *v.* FENWICK.<sup>1</sup>

IN THE COMMON PLEAS. 1670.

REPORTED CARTER, 215.

Action upon the case; a *quantum meruit* for divers wares and merchandises, as cloaths, laces, for himself and his servant; and also *indebitatus assumpsit*, and mentions the wares in particular. The defendant pleads *infra aetatem*. The plaintiff replies and confesseth the minority, and says: At that time he was son and heir apparent of Sir R. F. and was by consent of his father in treaty of a marriage with the Earl of ——— Daughter, and these things were for wedding cloaths. The defendant demurs to this.

Sise, Serjeant [for the plaintiff].

Brome, Serjeant, *contra*.

1. It appears not how many servants he had.

2. It appears not that those servants he had were necessary for his attendance.

3. It appears not what was for himself, and what for his servants. It appears by the pleading that his own father was alive. He takes upon him to provide for himself, and it may be more than his father will allow him.

Wild [Justice]. *Indebitatus assumpsit*. The defendant pleads under age: the plaintiff replies wares were sold for necessary apparel suitable to his degree: the defendant demurs, by his demurrer he hath confesst them to be necessaries: the defendant should have come and rejoyned they were not for necessaries, and so upon the issue; the jury should have tried it.

BARBER *v.* VINCENT.

IN THE COMMON PLEAS. 1680.

REPORTED FREEMAN, 531.

*Indebitatus assumpsit* for a horse sold for £20. The defendant pleaded *deins age*.

The plaintiff replied, that he sold him the horse for his convenience to carry him about his necessary affairs; to which the defendant demurred.

<sup>1</sup> Plaintiff's argument, and the opinions of Vaughn, C. J., Wild, Tirrell, and Archer, J., not relating to the demurrer, are omitted.

And the sole question was, whether an action would lie against an infant for money for a horse sold? It was urged on the defendant's part, that an infant was chargeable only for necessities, as, meat, drink, clothes, lodging, and education.

But the court were of a contrary opinion; for the plaintiff having averred that he sold him the horse to ride about upon his necessary occasions, and the defendant having confessed it by his demurrer, it must now be taken to be so. If the defendant had traversed, then the jury must have judged of it, whether it were necessary or convenient, or not; and so likewise of the price of the horse, whether it were excessive or not.

*Jud' pro quer' nisi.*

### AMORY AND OTHERS v. M'GREGOR.

SUPREME COURT OF THE STATE OF NEW YORK, ALBANY. AUGUST, 1815.

REPORTED 12 JOHNSON, 287.

This was a special action on the case for negligence in the transportation of goods. The declaration contained two counts. [These are here omitted.]

To this declaration there was a general demurrer, and joinder in demurrer.

Colden, in support of the demurrer.

D. B. Ogden, *contra*.

*Per curiam.* This case comes before the court on a general demurrer to the declaration. And the ground upon which it has been attempted to support the demurrer is, that the day laid in the declaration is during the existence of hostilities between this country and Great Britain; and that, of course, the contract set forth in the declaration is void, being contrary to the laws of the United States. Without giving any opinion upon the validity of the contract, if in point of fact, it was made at the time laid in the declaration, it is sufficient, in this case, to say, that the day being immaterial, the plaintiff would not be obliged to prove the contract to have been made on the day laid. Nothing appears upon the face of the declaration, showing the contract to be illegal or void. And it is a general rule, that a party cannot demur, unless the objection appears on the face of the pleadings. And so are all the cases referred to, and relied upon, by the defendant's counsel. In *Cheetham v. Lewis* (3 Johns. Rep. 42) and *Waring v. Yates* (10 Johns. Rep. 119), it appears, from the declaration, when the suit was commenced, and

the cause of action arose afterwards. The plaintiff must, therefore, have judgment, with leave to the defendant, however, to plead to the declaration.

Judgment for the plaintiff.

[*Extract from*]

PARTRIDGE *v.* STRANGE AND CROKER.

IN THE COMMON PLEAS.

REPORTED FLOWDEN'S REPORTS, 77 AT 85.

[By the court.] "For a demurrer is a confession of all matters of fact, but not of matters of law, for by the demurrer they put themselves upon the judgment of the court, and don't confess the law to be against them."

SMITH *v.* HENRY COUNTY.<sup>1</sup>

SUPREME COURT OF IOWA, DECEMBER TERM. 1863.

REPORTED 15 IOWA, 385.

Plaintiff claims the amount due upon certain coupons, set out in his petition, and alleges that the county of Henry issued the bonds, to which said coupons were attached, in accordance with the vote of the electors of said county, at a special election held for that purpose, pursuant to law; the object being to assist in the construction of a railway through said county. Demurrer to petition sustained, and plaintiff appeals.

T. W. Woolson, for the appellant.

Palmer & Ambler, for the appellee.

Wright, J. It is claimed in the first place that the question of the right or power of the county to issue these bonds does not arise, as the petition, the facts stated in which are admitted by the demurrer, avers that said bonds were issued according to law. The rule is, that a demurrer admits the facts which are well pleaded, but not the law as claimed by the pleader, nor the inferences and conclusions drawn by him. (*Games v. Robb*, 8 Iowa, 193; *Chitty*, Pl., 700.) If, therefore, there was no authority to issue these bonds, the averment of this legal conclusion cannot assist the pleader. . . . The demurrer was properly sustained, and the judgment should be

Affirmed.

<sup>1</sup> A part of the opinion not here relevant is omitted. — Ed.

PEASE v. PHELPS, ADMINISTRATOR *DE BONIS NON*  
OF THE ESTATE OF SAMUEL STEBBINS, DECEASED.<sup>1</sup>

IN THE SUPREME COURT OF ERRORS IN THE STATE OF CONNECTICUT.<sup>1</sup>  
JUNE, 1834.

REPORTED 10 CONNECTICUT, 62.

This was an action on a promissory note made by Samuel Stebbins, deceased, in these words: "Simsbury, January 7, 1818. I promise to pay John Wood Pease, when he shall arrive at the age of twenty-one years, the sum of one thousand dollars; value received. Samuel Stebbins."

The defendant pleaded in bar that Samuel Stebbins died in January, 1821, leaving his last will and testament, whereby he appointed his wife, Ursula Stebbins, and Samuel S. Stebbins, executors thereof; that the plaintiff became twenty-one years of age on the fifth of December, 1827; and the plaintiff's right and claim accrued after the death of said Samuel Stebbins, viz. on the fifth of December, 1827, and was not exhibited to said executors, or either of them, by the plaintiff within twelve months after the right of action accrued, and is the same for which the suit is brought.

The plaintiff replied that on the — day of March, 1821, and before the expiration of the time limited for the exhibition of claims against said estate, the plaintiff caused said note to be exhibited to said Ursula, and the same was then exhibited to and demanded of the said Ursula as executrix.

The defendant, in his rejoinder, averred that said claim was not exhibited to said executors, or either of them, by the plaintiff, within twelve months after the plaintiff arrived to the age of twenty-one years; and demurred to the residue of the replication. The plaintiff joined issue; and thus the pleadings terminated.

The cause was tried on the issue in fact, at Hartford, September Term, 1833, before Church, J.

The plaintiff claimed, and requested the court to instruct the jury, that upon the facts conceded on the pleadings by the demurrer, they should find that the note was duly presented within one year after the plaintiff came of age, and should, therefore, return a verdict for the plaintiff. The court did not so instruct the jury; and the defendant obtained a verdict. The plaintiff thereupon moved for a new trial; and the case was reserved for the opinion

<sup>1</sup> The reporter's statement and a part of the opinion are omitted. — ED.

of the Supreme Court of Errors upon the facts stated on the record, and on the matters embraced by the motion.

Hungerford and W. W. Ellsworth, for the plaintiff.

Sherman and Toncey, for the defendant.<sup>1</sup>

Church, J. "The question submitted by the pleadings to the jury was, whether the note in suit had been exhibited by the plaintiff to Ursula Stebbins, one of the executors, within twelve months after the plaintiff arrived at the age of twenty-one years; and to show that it had been so exhibited, the plaintiff offered witnesses to prove that the said Ursula, while executrix, had acknowledged that fact. This testimony was rejected by the judge; and in my opinion it was properly rejected. . . .

"But it was further claimed by the plaintiff that upon the facts conceded on the pleadings by the demurrer, the court should have instructed the jury to find that the note in question was duly presented within twelve months, as averred in the replication. This claim of the plaintiff cannot be supported. A demurrer presents only an issue in law to the court for consideration; the jury have no concern with it; and although it is a rule of pleading that a demurrer admits facts well pleaded for the sole purpose of determining their legal sufficiency, yet as a rule of evidence it was never supposed that a demurrer admitted anything." *Tompkins v. Ashby*, 1 Moody & Malkin, 32 (22 Serg. & Lowb. 239).

The other judges were of the same opinion, except Bissell, J., who was not present when the case was argued, and therefore gave no opinion.

New trial to be granted.

## 2. *The Several Kinds of Demurrers, and their Origin.*

### SPECIAL DEMURRERS.

*WALLIS v. SAVIL, et al.* [NOTE.]

IN THE COMMON PLEAS. 1702.

REPORTED NELSON'S LUTWYCHE, 16, AT 17.

'Tis true, in ancient times the pleadings were very plain, because the matter was then more regarded than forms; but in the reign of Edward III., my Lord Coke tells us, pleadings grew to perfection and then more exceptions were taken to forms than to the matter itself.

<sup>1</sup> The arguments of counsel are omitted.



Agreeable to this was the opinion of Mr. Justice Thirning many years before, viz. that such a plain way of pleading (where the matter and not the forms was regarded) was very feeble to what it was in the reign of Edward III., and yet we hear of no causes either lost or delayed by such feeble pleading, which could never have escaped the diligence of my Lord Coke, who was so great an advocate for forms, that he tells his reader they conduced to the right understanding of the law, and that 'tis a necessary part of a good common lawyer to be a good pronotary; and yet he farther tells us, that many causes were lost when pleading was at perfection, that is, when the substance and matter itself was not so much regarded as the forms of pleading, which began, as he observes, about the beginning of the reign of Edward III. and in a few years was improved to such niceties that a law was made even in that reign, that no man should be prejudiced by the forms of pleaders, so as the matter of the action was set forth in the declaration. [36 Edw. III. cap. 15, cf. Co. Litt. 168, *idem*; 303 *a.*]

But notwithstanding that statute, the serjeants-at-law (who for their skill in pleading were by the old writers called counters) had spun this part of the law so fine, and made it so intricate by forms, that the Parliament, *Anno* 27 Eliz., found it necessary to make another statute, giving the judges power, after demurrer joined, to give judgment according to the right of the cause, and matter in law, without regard to forms in pleading, excepting such omissions or defects as the party demurring shall particularly express and show for cause of his demurrer.

But still the opinions of men did so far lean towards forms, that some omissions and defects therein have been taken to be matter of substance; as, for instance, an immaterial traverse; the omission of entering pledges on the bill or declaration; the omission of a *profert hic in curia*, where a deed is mentioned in the declaration, or in any letters of administration; the omission of *vi et armis et contra pacem*; the want of an averment, viz. and *hoc paratus est verificare*; or not alleging *prout patet per recordum*; all which are only matters of form, and yet they have been held to be substance.

Therefore, *Anno* 4 and 5 Anne, another statute was made, that after Trinity Term, 1706, no advantage or exception shall be taken to the pleading for any of those omissions, unless it shall be particularly shown for cause of demurrer.

ENACTED 27 ELIZ. CAP. V. PAR. 1.

Forasmuch as excessive charges and expenses, and great delay and hindrance of justice, hath grown in actions and suits between the sub-

jects of this realm, by reason that upon some small mistaking or want of form in pleading, judgments are often reversed by writs of error, and oftentimes upon demurrers in law given otherwise than the matter in law and very right of the cause doth require, whereby the parties are constrained either utterly to lose their right, or else, after long time and great trouble and expenses, to renew again their suits; for remedy whereof, be it enacted by the Queen's most excellent majesty, the lords spiritual and temporal, and the commons, in this present parliament assembled and by the authority of the same, That from henceforth, after demurrer joined and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right and cause of the matter in law shall appear unto them, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express together with his demurrer; and that no judgment to be given shall be reversed by an writ of error, for any such imperfection, defect, or want of form as is aforesaid, except such only as is before excepted.

### ANONYMOUS.

ANNO 1703.

REPORTED 3 SALKELD, 122.

Per Holt, Chief Justice. There were special demurrers at common law, but they were never necessary but in cases of duplicity, and therefore they were seldom practised; for as the law was then taken to be upon a special demurrer, the party could take advantage of no other defect in the pleading, but to that which was specially assigned for cause of his demurring.

2. But upon a general demurrer he might take advantage of all manner of defects, that of duplicity only excepted; and there was no inconvenience in such practice, for the pleadings being at bar *viva voce*, and the exceptions taken *ore tenus*, the causes of demurrer were as well known upon a general demurrer as upon a special one; therefore after the reformation, when the practice of pleading at bar altered, the use of general demurrers still continued, and thereby this public inconveniency followed, that the parties went on to argue a general demurrer not knowing what they were to argue, and this was the occasion of making the statute 27 Eliz., by which it is enacted, that the causes of demurrer should be known in all cases, and this was restorative of the common law.

3. Demurrer to the evidence admits the truth of the fact, but

denies its effects in law; and if such demurrer is at the Assizes, it shall be tried and determined in B. R., or in C. B., etc., and if the demurrer is upon written evidence, the plaintiff must join or waive it; otherwise, if it is upon parol evidence.

4. Many things have been adjudged ill upon a special demurrer, which are otherwise upon a general demurrer; as, for instance, in trespass, the defendant pleaded a descent to him as heir, and did not say *filio* and *heredi*, or how he was heir, this is naught on a special demurrer.

5. So in debt upon a bond to save harmless, the defendant pleads *indamnicatum servavit*.

6. So *petit judicii' si ab actione* instead of *petit judicii' damna*.

### LAMPLOUGH v. SHORTRIDGE.

IN THE KING'S BENCH. 1706.

REPORTED 1 SALKELD, 219.

In demurrer for duplicity, it is not sufficient to demur, *quia duplex est*, or *duplicem habet materiam*; but the party must show wherein; for the statute by requiring to show cause intended to oblige the party to lay his finger upon the very point. Per Holt, C. J.

#### ENACTED 4 ANN. CAP. XVI. § 1.

For the amendment of the law in several particulars, and for the easier, speedier, and better advancement of justice, be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the first day of Trinity term, which shall be in the year of our Lord one thousand seven hundred and six, where any demurrer shall be joined, and entered in any action or suit in any court of record within this realm, the judges shall proceed and give judgment, according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfections, omission, or defect in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same, notwithstanding that such imperfection, omission, or defect might have heretofore been taken to be matter of substance, and not aided by the statute made in the twenty-seventh year of Queen Elizabeth, intituled, "An Act for the furtherance of justice in case of demurrer and pleadings," so as sufficient

matter appear in the said pleadings, upon which the court may give judgment according to the very right of the cause; and therefore from and after the said first day of Trinity term, no advantage or exception shall be taken of or for an immaterial traverse; or of or for the default of entering pledges upon any bill or declaration; or of or for the default of alleging the bringing into court any bond, bill, indenture, or other deed whatsoever mentioned in the declaration or other pleading; or of or for the default of alleging of the bringing into court letters testamentary, or letters of administration; or of or for the omission of *vi et armis et contra pacem*, or either of them; or of or for want of averment of *hoc paratus est verificare*, or *hoc paratus est verificare per recordum* or of or for not alleging *prout patet per recordum*, but the court shall give judgment according to the very right of the cause, as aforesaid, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shown for cause of demurrer.

THE MASTER AND WARDENS OF THE SOCIETY OF  
INNOLDERS IN LONDON *v.* GLEDHILL.<sup>1</sup>

IN THE KING'S BENCH. 1756.

REPORTED SAYER'S REPORTS, 274.

Errors in form cannot be availed of on a general demurrer.

In the declaration in an action of debt, for the penalty of five pounds inflicted by a by-law, it was alleged: that the Society of Inn holders was incorporated by a charter from King Charles the Second; that by the charter a power was given of making by-laws, and of inflicting penalties for the breach thereof; that a by-law was made, by which it was ordained, that every person, being a freeman of the company, who shall be elected upon the livery, shall accept the livery and clothing, and upon so doing pay a fine of ten pounds; or upon a refusal to accept the livery and clothing, shall forfeit the sum of five pounds to the master and wardens, to the use of the master, wardens, and society, the penalty to be sued for by the master, wardens, and society, in the name of the master, wardens, and society, in any of the king's courts; that the defendant being a freeman of the company, was elected upon the livery; that due notice was given him of his being elected; that he refused to accept the livery and clothing; and that he has not paid the penalty of five pounds.

<sup>1</sup> A part of Ryder, Ch. J.'s opinion, and the opinions of Foster and Wilmot, J., are omitted. Denison, J., gave no opinion.

Upon a general demurrer to this declaration, the question was, whether it be good?

It was holden that it was not.

And by Ryder, C. J., . . . We are of opinion that this declaration is not good; because it is not therein alleged, that the Company of Innholders has a livery. . . .

It has been said: that the want of its being alleged in the declaration, that the company have a livery, is a matter of form, which cannot be taken advantage of upon a general demurrer; but we are of opinion, that this is traversable, and might have been put in issue; and, consequently, that it is a matter of substance.

Foster, Denison, and Wilmot, J., concurred.<sup>1</sup>

### HEARD *v.* BASKERVILE.

IN THE COMMON PLEAS. 1614.

REPORTED IN HOBART, 232.

Form and substance distinguished.

William Heard brought a replevin against Richard Baskerville; the defendant, as bailiff to John Dinham, Esq., *cognovit captionem*, for he saith, that long before, etc., one Thorne was seised of the place, etc., in fee, and, 12 Edw. II., granted a rent of two shillings, with a clause of distress, unto one Millington: and that he died seised, after whose death the rent descended unto another Millington, as his cousin and heir, without showing how his cousin; and then shows, that the latter Millington, 21 Hen. VIII., did grant unto one Dinham, and his heirs, the said rent in exchange, which was executed on both sides; and then conveys the rent down by descent unto Dinham, in whose right, etc.; upon which conusans the plaintiff demurred generally.

And the only question whereupon the court stood was, whether the not setting down of the manner of cousinage were matter of substance, or only of form, such as by the Statute of Demurrers, 27 Eliz. c. 5, ought to be particularly set down, or else no advantage to be taken of it.

This case, as being of great consequence in the rule, was argued by the judges publicly, and adjudged for the defendant, Warburton only dissenting.

<sup>1</sup> Foster, J., and Wilmot, J., agreed that the declaration was also bad for that there was no allegation that the defendant was a freeman of the City of London.



In this case all the parts of the statute were considered: the title is for the furtherance of justice; that is, justice final and definitive, which ends the controversy by deciding it, according to the very right. For every several action or suit hath a kind of justice which may be called interlocutory, in which a man may fail, though his right be good, as for want of form before this statute, which bred much charge and multiplicity of suits, and was also a hinderance of that definitive justice, which this statute intends to further.

Now the moderation of this statute is such, that it doth not utterly reject form, for that were a dishonor to the law, and to make it in effect no art, but requires only that it be discovered, and not used as a secret snare to entrap. And that discovery must not be confused and obscure, but special; therefore it is not sufficient to say, that the demurrer is for form, but he must express what is the point and speciality of form that he requires. And so is the word and meaning of the statute.

Now, then, the main question is, what is matter and what is form, within the meaning of the law? The statute best expresseth itself in this, for it divideth itself into two main members, which are *membra dividenda*.

First, Want or imperfection of form.

Second, The matter in law or very right, *scil.* the true, mere, or very right; to which must be added that which the statute adds, that this right, according to which judgment is to be given, must appear to the court within the body of the record.

So now, whatsoever it is without which the right doth sufficiently appear to the court, it is form within this law; and so, *e converso*, whatsoever is wanting or imperfect, by reason whereof the right appears not, is not remedied as form within this law.

And therefore if an executor or administrator bring an action of debt, and do not produce his probate or administration, it is not holpen.

So if a man plead a conveyance of a rent, or the like, that cannot pass without deed, without producing the deed in plea, it is not holpen; for it is not enough for the party to say that he is executor, or that rent was granted to him; but the court must see and adjudge of it, or else the right appears not, and the adverse party may cause the deed to be enrolled, which makes it a part of the plea, whereupon the court shall judge whether it maintain the plea or not.

So if the means be wanting whereby the right should be made to appear, it is uncurable; as if a man bring an action of debt upon an obligation, and produce it, but say it may be made beyond sea, or

in no place, a general demurrer serves. And for the same reason two affirmatives without a traverse is not holpen, because it admits no trial, without which the court cannot see the right.

If a man bring an action upon an obligation to perform an award, the defendant pleads no award made, the plaintiff replies and shows the award; now here is a full issue, a negative and an affirmative. Yet if the plaintiff doth not also assign the breach, the defendant may demur generally, yet that breach was not traversable, but the plea as between the parties hath an issue before. And this is but an excrescence or surplusage. But yet because it doth appear to the court that he had right or cause of action without it, it is matter, and not form, to set it forth for information of the court. And this is a case of some singularity upon this statute.

But now to the case in question, the descent to Millington, as cousin and heir, is the substance and body of the plea. And the rest which is required under, viz. is but a specification and explication of the same thing by manner how it is, which is not the point issuable, but the general descent as it is ruled in the case of challenge for cousinage. 14 Eliz. Dyer, 319; 9 Edw. IV. 3; 19 Hen. VIII. 7. And note that this is matter of fact to be tried by jury, whether it were pleaded generally or specially. So it is not like the cases of not showing deeds, or the like, whereof we speak before, whereupon the court is to judge.

Note Wimbish and Talbois' Case, Plo. 38. Wimbish and his wife plead, that she was the person to whom the interest of the land did belong, after Elizabeth Talboys; and the opinion of the court was equal, whether that were well or not; yet that was at the common law before this statute, but indeed the plea followed the words of the statute, 11 Hen. VII., which were in the general; whereupon they replied, that maintained the plea, and that was less certain than this, for she might be next either by descent or purchase, or by reversion or *rem.*

Now where it was objected by Warburton, that if the pedigree had been set down, the plaintiff might have pleaded a release of any of those ancestors, or pleaded bastardy in any of them, it was answered, that the traverse of the descent of the rent to Millington must have been the issue in both cases, and would have served, and so will, though the pedigree be not set down.

Note, that as a demurrer at the common law did confess all matters formally pleaded, so now, by the statute, a general demurrer doth confess all matters pleaded, though unformally, according to the forms meant by this law; for such forms are now not material, not being expressed in the demurrer.

BOWDELL *v.* PARSONS.

IN THE KING'S BENCH. 1808.

REPORTED 10 EAST'S TERM REPORTS, 359.

Errors in form defined.

[The first count in the declaration is here omitted.] The second count stated, that whereas on the said 10th day of May, in the year aforesaid [in the first count, 1808], at Ware aforesaid [in the first count] in consideration that the plaintiff, at the request of the defendant, had purchased of him a certain other stack of hay, at the rate of £5 10s. per load, to be therefore paid to the defendant, the defendant undertook and promised the plaintiff to deliver to and suffer him to take the same, when the defendant shall be thereunto afterwards requested. And the plaintiff avowed, that although the defendant did afterwards deliver to him a part, to wit, one load of the hay, which was then and there paid for by the plaintiff at the rate aforesaid, and did request of the defendant to deliver to and suffer him to take the same; yet the defendant, not regarding his said promise and undertaking, did not nor would, although duly requested, deliver to or permit the plaintiff to take the residue, etc., but so to do wholly refused and still refuses; and by means of such refusal, etc., the plaintiff was put to great inconvenience and expense, to wit, at Ware aforesaid. The request by the plaintiff to the defendant to deliver the residue of the hay was laid in the same manner in other similar counts.

And after judgment by default, and a writ of inquiry executed, it was moved, on a former day, to arrest the judgment, because the request was not specifically alleged with a venue, as it ought to be where a request in fact is necessary to give the plaintiff his cause of action; as it was contended to be in this case. For which were cited *Peck v. Methold* [3 Bulst. 297], and *Back v. Owen* [5 Term Reports, 409].

Espinasse now showed cause.

Cowley, in support of the rule, relied on the cases before mentioned [and others].

Lord Ellenborough, Chief Justice. It appears to me that the second count is sufficient to sustain judgment for the plaintiff, as well as the first. The question comes now to be considered by us after the statute 4 Ann. c. 16, for the amendment of the law; the first section of which enacts "that in all cases where any demurrer shall be joined, etc., the judges shall proceed and give judgment ac-



cording as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any writ, etc., declaration, or other pleading, etc., except those only which the party demurring shall specially and particularly set down and express as cause of demurrer; notwithstanding that such imperfection, omission, or defect, might theretofore have been taken for matter of substance, and not aided by the statute 27 Eliz. c. 5; so as sufficient matter appear in the said pleadings upon which the court may give judgment according to the very right of the cause." Now it is admitted, according to what was said by Lord Mansfield in *Collins v. Gibbs*, that this being a motion in arrest of judgment is to be considered exactly the same as if the question had arisen on general demurrer. Then what does the statute say upon the subject? after specifying the want of several matters of form, of which no advantage or exception shall be taken, it proceeds to say that "the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, or defects, or any other matter of like nature, except the same shall be specifically and particularly set down and shown for cause of demurrer." Now is not the omission to repeat a venue (for it must always be remembered that there is one venue well laid in the declaration) a less material omission than the want of alleging *prout patet per recordum*, where a record is pleaded; which is one of the instances specified where the omission shall not be taken advantage of without being specially shown as cause of demurrer; for that is an omission to refer to that by which alone the allegation is to be proved; but here the omission is of that which is mere form. It is said that a request must be alleged, and so it is; but then it is said that it is not duly alleged; the imperfection consists only in the want of a time and place, where a venue was before laid; an omission by no means of equal importance with several of those instanced in the statute. The case of *Back v. Owen* is relied on, as having been decided on this objection since the statute; where Mr. Justice Buller said, "that the want of a request was a substantial defect in the declaration, and that where it was necessary to allege a special request, the general words, though often requested, would not answer the purpose." There was no judgment, however, in that case; but leave was given to amend, and the cases referred to in the margin of the report, if cited by him as supporting that position, are all before the statute of Anne. Another case was cited of *Wallis v. Scott*, which came on upon general demurrer subsequent to that statute; but there judgment was ultimately given for the plaintiff when the court was full. And though one of the judges in the first

instance threw out an opinion, that where a request was by law necessary (which he thought it was not in that instance), the general averment would not be sufficient, but it must be particularly set forth, that the court might judge whether it was sufficient; yet it is to be observed, that the healing operation of the statute of Anne was not presented to the consideration of the court. Nor was it so in the case of *Back v. Owen*; for if it had, I think the objection there must have been overruled; because it was not only an objection of like nature, but of less force than several of those stated in the statute. In this case there is an allegation of a request, which it is admitted would be sufficient if time and place were laid with it; and I am of opinion that the want of those since the statute is not a sufficient objection in arrest of judgment.

Grose, J., declared himself of the same opinion.

LeBlanc, J. . . . Clearly . . . the want of alleging a time and place to the request is only matter of form, and is not sufficient to arrest the judgment.

Bayley, J., of the same opinion.

Rule discharged.

## STATE *v.* COVENHOVEN.

SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM. 1797.

1 HALSTEAD'S REPORTS, 396, AT 401.

[Extract from the opinion of Kinsey, Chief Justice.] "Another observation may here be made, in answer to what was dropped by one of the counsel, on the argument. It was said, that on a special demurrer no objection can be taken which is not particularly specified in the demurrer, and therefore that the prosecution is precluded from urging some of the objections which have been made. The observation, so far as it relates to formal defects, is correct, and warranted by the statute, but defects of substance may be taken advantage of at any time" [tho' unspecified].

STATE OF MAINE *v.* PECK AND OTHERS.

SUPREME JUDICIAL COURT, MAINE. 1872.

REPORTED IN 60 MAINE REPORTS, 498.

Every special demurrer includes a general demurrer.

On exceptions. Debt on the official bond of Benjamin D. Peck, Treasurer of the State of Maine, dated Jan. 28, 1858. Writ dated March 23, 1861.

At the April Term, 1868, the defendants pleaded full performance of the covenants and condition of the bond. To which the plaintiff replied, that the principal defendant was Treasurer of the State from Jan. 13, 1858, to Feb. 4, 1859, and that on Jan. 14, 1858, and divers other days and times between that day and Feb. 4, 1859, the said Peck, as said treasurer, received divers sums, amounting to \$39,231.19, belonging to the State of Maine, and hath not accounted for any part of it. To this replication the defendants filed a special demurrer, which was joined.

(The pleadings may be found 58 Maine, 123.)

May 30, 1871, the certificate of the decision of the law court was received by the clerk overruling the demurrer and adjudging the replication good. On the 13th day of the succeeding October Term, 1871, the defendants moved for leave to withdraw the demurrer without the consent of the plaintiff and plead to the issue, tendering therewith a rejoinder alleging, substantially, that Peck did account for and pay to the plaintiff the said sums of money by the replication alleged not to have been paid, and tendered an issue to the country. But the presiding judge overruled the motion and declined to receive the rejoinder, and ordered judgment to be entered for the plaintiff for \$150,000, the penalty of the bond.

T. B. Reed, Attorney-General, for the State.

J. & E. M. Rand, for the defendants.

The defendants had a right to rejoin.

Not proper to enter a final judgment for the plaintiff, upon overruling a special demurrer to a replication.

A special demurrer does not admit the truth of all facts well pleaded, as is the case with general demurrer.

Even general demurrer does not admit damages, — an averment that defendant owes plaintiff a stated sum as damages. *Millard v. Baldwin*.

Nothing in R. S. c. 82, s. 19, deprives defendants of right to rejoin,

but only declares that a demurrer once filed shall be ruled upon, unless withdrawn by consent before ruling.

Danforth, J. This case has once been before the law court upon a special demurrer to the plaintiff's replication. 58 Maine, 123.

The demurrer was overruled, the replication held good, and the case sent back for final judgment, unless the defendants were permitted to withdraw their demurrer and plead anew under the provisions of the R. S. c. 82, s. 19. At the term subsequent to the announcement of the decision, the defendants' counsel moved for leave to withdraw said demurrer, without the consent of the plaintiff and without complying with the provisions of the statute, and to plead to the issue. This motion was denied and judgment ordered for the plaintiff. To this the defendants except, and now claim the allowance of the motion as of right. If the judgment upon the issue, as made up, should have been *respondeat ouster*, the defendants are right in their claim, otherwise not.

Previous to the several acts embodied in the revision above cited, on a general demurrer, final judgment would have been ordered by the law court, and entered as of the preceding, instead of at the following term. The demurrer was not to a plea in abatement, but to a replication, which presented the full merits of the case. The party had his option to plead or demur. By electing the latter, "he shall be taken to admit that he has no ground for denial or traverse." Stephen on Pl. 143.

The result of this principle is the well-established rule, "that a demurrer admits all such matters of fact as are sufficiently pleaded." It must be conceded that the replication contains all the facts necessary to maintain the plaintiff's case, and the court have decided that it is sufficient in form. Hence a final judgment must necessarily follow. The authorities are to the same effect. Stephen, in his work on pleading, treating of judgments for the plaintiff, says, on pages 104, 105: "If it be an issue in law, arising on a dilatory plea, the judgment is only that the defendant answer over. . . . Upon all other issues in law, and in general all issues of fact, the judgment is, that the plaintiff recover." Also in note on page 144: "On demurrer to any pleadings which go to the action, the judgment for either party is the same as it would have been on an issue of fact, joined upon the same pleadings and found in favor of the same party." *Clearwater v. Meredith*, 1 Wallace, 25, 43; *McKeen v. Parker*, 51 Maine, 389; *McAllister v. Clark*, 33 Conn. 258; and in *Parlin v. Macomber*, 5 Maine, 413; *Washington v. Eames*, 6 Allen, 417, final judgment was ordered by the law court. But without denying the correctness of these principles when applied to a general demurrer, it is contended that they

are not applicable to a special one, and it is said that none of the authorities so lay down the law. While this may be true, it is also true that in *Parlin v. Macomber*, above cited, the court applied the law to a special demurrer, and also in *Washington v. Eames*, though in Massachusetts, under their Practice Act, all demurrers must be special. No authority has been cited, or fallen under notice, in which any distinction between the two kinds of demurrer, in respect to the judgment, has been alluded to, which, to say the least, is a little singular, if any such difference exists.

Nor are we able to perceive any such distinction from the principles involved.

Every special demurrer includes a general one, for under the former "the party may, on the argument, not only take advantage of the faults which his demurrer specifies, but, also, of all such objections in substance, as regarding the very right of the cause, as the law does not require to be particularly set down." Stephen on Pl. 141, 142; Bouvier's Law Dict., "Demurrer." In the one just as much as in the other the party has his option to plead or demur, and must be equally bound by his election. But one answer, unless by leave of court, can be made to the plea, and if that is overruled, it must stand as true. A special demurrer raises a question of law just as much as a general one, and there is no exception to the rule as laid down, that where there is an issue of law upon a plea "which goes to the action" the judgment will be final.

To these principles of law the statute adds its mandate. R. S. c. 82, s. 19. The statute gives the parties some rights which did not previously exist, and, for the purpose of enabling them to secure those rights, the action is to stand upon the docket until the term following the certificate of decision. But these rights must be asserted within the time and in the manner specified, otherwise they are waived, and the case ended. No distinction is made between a special and general demurrer, but the word used comprehends both. In this case the new pleadings were not filed on the second day of the term, nor do the costs appear to have been paid. Hence, in accordance with the statute, judgment must be entered.

Appleton, C. J.; Cutting, Walton, and Dickerson, J. J., concurred. Tapley did not concur.

3. *The Effect of Demurrers in Opening up the Record.*MATHEWSON *v.* WELLER AND OTHERS.<sup>1</sup>

CASES IN THE SUPREME COURT, NEW YORK. MAY, 1846.

REPORTED 3 DENIO, 52.

A demurrer opens up the entire record.

Demurrer to a surrejoinder. The declaration was in trespass for taking a pair of horses. Plea, a justification of the seizure under an execution issued by a justice of the peace on a judgment against the plaintiff in favor of Weller, Haynes, and Johnson, three of the defendants, the other defendant being a constable. It states the recovery of the judgment on the 29th day of August, 1842, without stating any facts to show, or making any averment that the justice had jurisdiction. Replication, that the plaintiff was a householder, and that the horses were his necessary team, and were of less value than \$150 (to show that the property was exempt from execution under the Act of 1842, p. 193, s. 1). Rejoinder, that the judgment on which the execution issued, by virtue of which the horses were taken, was rendered for the purchase money of a stove sold by the three defendants who recovered the judgment to the present plaintiff, and by him kept for use. Surrejoinder, that the plaintiff purchased the stove mentioned in the rejoinder of the three defendants, Weller, Haynes, and Johnson, before the passage of the exemption act of 1842, to wit, on the 10th day of October, 1840, and not afterwards. Verification. Demurrer and joinder.

By the court, Jewett, J. It is not denied that the plea is bad in substance; and it is well settled that the judgment must be against the party who has committed the first substantial fault in pleading (*Mercein v. Smith*, 2 Hill, 210). If this were otherwise, the defendant would prevail, because the surrejoinder shows that the debt for which the judgment was rendered was contracted prior to the passage of the Act of 1842, and therefore, according to the case of *Quackenbush v. Danks* (1 Denio, 128), that act has no application to the case.

N. Hill, Jr., for the defendants.

D. Wright, for the plaintiff.

Judgment for the plaintiff.

<sup>1</sup> The arguments of counsel and part of the opinion are omitted.

## ANONYMOUS.

IN THE COMMON PLEAS. 1763.

REPORTED 2 WILSON, 150.

And judgment is given against him who made the first error in pleading.

Debt on a bond with condition for the payment of a certain sum of money on a certain day; defendant pleads payment before the day; plaintiff replies that the defendant did not pay before the day; *et de hoc ponit se super putriam*; defendant demurs, and plaintiff joins in demurrer.

Nares, Serjeant, for the defendant admitted that the plea at first was bad, but insisted the plaintiff had made it good by replying and tendering issue upon it, or that if the issue was immaterial there ought to be a replader.

Hewitt, Serjeant, *contra*. This is a case where defendant has not joined issue to the country, but has put himself upon the judgment of the court; and though the replication be bad, yet whenever the case is upon a demurrer, the court looks for the first fault, which is in the plea here; and therefore judgment ought to be for the plaintiff; and of that opinion was the court, and gave judgment for the plaintiff.

## ANONYMOUS.

IN THE KING'S BENCH. 1701.

REPORTED 2 SALKELD, 519.

Unless, indeed, that error has been cured by pleading over.

If a man pleads over, he shall never take advantage of any slip committed in the pleading on the other side, which he could not take advantage of upon a general demurrer. Per Holt, C. J., see 6 Mod. 136.

COLE, EXECUTOR OF ANN HILL, *v.* ANDREW SMALLEY.<sup>1</sup>

NEW JERSEY SUPREME COURT, FEBRUARY TERM. 1856.

1 DUTCHER'S REPORTS, 374.

Action by an executor. Plea in abatement for the nonjoinder of another executor. The plea avers that the testatrix appointed the

<sup>1</sup> So much of the case as does not relate to the effect of demurrers in opening up the record is omitted.

plaintiff and one I. V. executors of her will; that the said I. V., as executor, administered upon the estate, and that he is still living. The plaintiff replies, that the said I. V. did not administer upon the estate. To this replication the defendant demurs.

The cause was argued before the Chief Justice, and Elmer, Potts, and Haines, justices.

J. W. Miller, for the defendant, in support of the demurrer.

G. H. Brown, for plaintiff, *contra* [contended among other things, that], if the replication is defective, the plaintiff is nevertheless entitled to judgment, because the defendant's plea is bad for uncertainty. Gould's Pl. 83, ch. 3, s. 54.

The Chief Justice. If, moreover, the plea be erroneous . . . for uncertainty, it is a defect in form, which could only be taken advantage of on special demurrer, and is aided by pleading over. A demurrer reaches back, and attaches only to substantial defects in the previous pleadings. Gould's Pl. 474.

The demurrant is entitled to judgment.

### HASTROP *v.* HASTINGS.

IN THE KING'S BENCH. 1692.

REPORTED IN 1 SALKELD, 212.

Or unless the plea be one in abatement, behind which the demurrer cannot go.

In an action upon the case for beer and wages, the defendant pleaded in abatement, *et pet. judicium de billa, et quod billa predict. cassetur*; for incertainty in the declaration [:] upon demurrer, the defendant's counsel insisted upon many faults in the declaration. *Et per cur.* The defendant shall not take advantage of mistakes in the declaration upon a plea in abatement; but if he would do that, he must demur to the declaration, *per quod a respondeas ouster* was awarded.

### POWYS, EXECUTOR OF LLOYD, *v.* JOHN WILLIAMS.

IN THE COMMON PLEAS. 1698.

REPORTED LUTWYCHE, 1601.

[Extract from the opinion of Treby, C. J., at 1604.]

Concerning the judgment in the principal case, see the case of Bellasis & Hesper before in this book, where in assumpsit on a bill



of exchange the defendant pleaded in abatement that the action was brought before the bill was payable ; and in the debate of that case an exception was taken to the declaration ; but the opinion of the court was, that no advantage could be taken of a fault in the declaration on a demurrer to a plea in abatement.

RICH (SIR PETER) *v.* PILKINGTON, LORD MAYOR  
OF LONDON.

IN THE KING'S BENCH. 1692.

REPORTED CARTHEW, 171.

Action on the case for a false return to a mandamus, in which action the plaintiff declared, that he was lawfully elected into the office of Chamberlain of London, and that the defendant refused to admit him into that office ; whereupon he brought a mandamus directed to the defendant and the aldermen, etc., and the defendant returned, that the plaintiff *nunquam fuit electus* to the said office, *ubi revera* he was lawfully elected by the majority, etc.

The defendant pleaded in abatement, that the mayor and aldermen of London are a corporation, and that all of them in their judicial capacity in a court of aldermen jointly made the said return ; and thereupon prayed judgment of the bill brought against the mayor alone.

And upon a demurrer, to this plea it was adjudged ill, for this action is founded on a tort, and therefore it may be either joint or several at the election of the party, as in trespass, etc. . . .

Then the counsel for the defendant would have taken exceptions to the declaration, but the court would not allow it ; because here was a plea in abatement, to which the plaintiff might have demurred ; and for that reason he [the defendant] shall never take exceptions to the declaration ; to which the counsel replied, that it appeared by the plaintiff's own showing that he had no cause of action at the time when this action was brought.

For the return of the *pluries* mandamus is laid to be after the beginning of Michaelmas Term, and the memorandum of the bill is entered generally of that term ; and that this was such a fault that they might show as *Amicus Curie* ; and thereupon the plaintiff prayed to amend, which was granted, and judgment was given ; *quod respondeat ouster*.

DEAN *v.* BOYD FOR BERRY.

COURT OF APPEALS OF KENTUCKY, FALL TERM. 1839.

REPORTED 9 DANA, 169.

For a plea in abatement is to the writ, and the demurrer cannot go back of the declaration to attack a plea to the writ.

From the Circuit Court for Fleming County.

The Chief Justice delivered the opinion of the court.<sup>1</sup>

In an action of debt, brought in the name of John Boyd, for the use of Robert Berry, against Joseph Dean — in which the declaration averred that the bond sued on had been executed by Joseph Dean to the “said Joseph Dean,” and had afterwards been sold by Boyd to Berry — Dean filed a plea in abatement, averring that Boyd was a non-resident of Kentucky, and had failed to file, according to the statute, a bond securing the costs.

The circuit judge, having sustained a demurrer to the plea, rendered judgment against Dean, for the debt, on his refusing to plead over. . . . We are of the opinion that the plea, as filed, is not sufficient for abating the writ. . . .

The plaintiff in error insists, however, that the declaration is radically defective, and that, therefore, even if the plea be insufficient, the circuit judge erred in sustaining the demurrer to it.

The declaration is, in our opinion, insufficient for maintaining the action; for though it may not be improbable that there is a mistake in the averment that the bond was executed by Joseph Dean to “the said Joseph Dean;” yet, nevertheless, we cannot, without any clue whatever, decide judicially, either that the bond is not so written, or that John Boyd is or was intended to be the obligee. The averment, that John Boyd sold the bond to Robert Berry, cannot help the declaration; for that fact does not show that Boyd was the obligee, or had legal authority to transfer the obligation.

Nor can the exhibition, in the record, of a bond of the same date for the same amount, payable on its face to John Boyd, be entitled to any influence; because, as no oyer was either granted or craved, that bond is not legally before us, and cannot, therefore, be judicially noticed.

But, though the declaration thus appears to be insufficient, still the demurrer to the plea did not bring up the count, or authorize

<sup>1</sup> A part of the opinion not here relevant is omitted.

the circuit court to consider it; because a plea in abatement applies to the writ only.

Wherefore the circuit judge did not err in sustaining the demurrer to the plea in abatement.

But, as the declaration is insufficient, the court erred in rendering judgment for the debt sought to be recovered.

And, therefore, the judgment must be reversed, and the cause remanded with instructions to give leave to amend the declaration, if the plaintiff shall ask such leave; otherwise to dismiss the suit.

### DAVIES v. PENTON.

IN THE KING'S BENCH. 1827.

REPORTED IN 6 BARNEWALL & CRESSWELL, 216.

Nor can a demurrer to a defective pleading in one record attack a defect in another record.

Declaration stated articles of agreement of the 23d December, 1823, made between plaintiff and defendant, which recited that defendant for many years then past carried on the practice and profession of a surgeon, apothecary, and accoucheur, and had established a considerable connection in such business; and that, having determined to withdraw from the same, he had agreed with the plaintiff for the sale to him of all his then stock, and of the goodwill of his said business; and also to demise to him his house in Great Surrey Street, in which the business was then carried on, upon the terms following; that is to say, the sum of £800 to be paid for the goodwill of the business of a surgeon, apothecary, and accoucheur, and the influence and recommendation thereafter agreed to be given by defendant unto and in favor of plaintiff, and the lease of the house in Great Surrey Street, for the term of nineteen years and one-quarter, subject to the yearly rent of £80; and the stock in trade to be taken and purchased by plaintiff at a fair valuation; and that in part pursuance of the agreement defendant had accordingly demised to plaintiff the said messuage or tenement, with all and singular the appurtenances, for the term of nineteen years and one-quarter of a year, wanting two days, from the 25th of December, 1823, at the yearly rent of £80. The articles of agreement then stated that defendant, in further pursuance of the said agreement, and for and in consideration of £400 to the defendant in hand paid by the plaintiff at or before the signing of the articles of agreement, and for and in consideration of the further sum of £400 (being the remainder of the said sum of £800 consideration money therein-

before mentioned), secured to be paid to defendant by a bill of exchange, bearing even date with the agreement, drawn by defendant upon and accepted by plaintiff for the said sum of £400, and payable twelve months after date; and of the further sum of £170 4s. (being the ascertained value of the stock in trade, goods, fixtures, and effects used in and about the said business or profession, as, agreed upon between plaintiff and defendant), also secured to be paid to defendant by a certain other bill of exchange, bearing even date with the said agreement, drawn by defendant upon and accepted by plaintiff for the said sum of £170 4s., and payable at two months after the date thereof, agreed to and with plaintiff in manner following; that is to say, that he, defendant, should permit plaintiff to have, use, and exercise the said business, practice, and profession of a surgeon, apothecary, and accoucheur, from 24th December, 1823, and to carry on the same in and upon the same house and premises, and in the same way and manner as defendant had been used and accustomed to do; and to have, receive, and take the whole of the profits and produce of such practice and profession, to and for his own use and benefit; and that defendant should use his best endeavors and influence with all his patients and friends to prevail upon them to employ plaintiff in the way of his said practice and business. And plaintiff did thereby agree to and with defendant that he, plaintiff, would well and truly pay and discharge the said two several bills so drawn upon and accepted by him, plaintiff, for the sums of £400 and £170 4s. as aforesaid unto defendant, as and when the said bills of exchange respectively became due and payable; and the defendant did by the said articles of agreement, lastly, promise and agree to and with plaintiff, that he, defendant, should not, nor would at any time thereafter, use, exercise, and carry on the art, business, or profession of a surgeon, apothecary, or accoucheur, within the distance of five miles from the said messuage, being No. 12 in Great Surrey Street aforesaid, for his own private benefit or emolument, in any manner howsoever; and for the true performance of all and singular the agreements aforesaid, each of them, defendant and plaintiff, did thereby bind and oblige himself unto the other of them, in the penal sum of £500, to be recoverable for breach of the said agreement, in any court or courts of law, as and by way of liquidated damages. The declaration then stated mutual promises. Breach, that the defendant did use, exercise, and carry on the business or profession of a surgeon, apothecary, and accoucheur, within the distance of five miles from the said messuage. Plea, that plaintiff did not well and truly pay and discharge the said two several bills of exchange,

according to the form and effect of the articles of agreement in that behalf, but wholly neglected and refused so to do, and therein failed and made default; and thereupon and according to the tenor and effect, true intent, and meaning of the articles of agreement, the plaintiff forfeited and became liable to pay to defendant the said sum of £500 in the articles of agreement mentioned, as and by way of liquidated damages. The plea then alleged further, that the plaintiff at the commencement of the suit was indebted to the defendant in the further sum of £500 for work and labor, etc. Replication (except as to so much of the plea as related to the penal sum of £500 first mentioned), that plaintiff before and on the 23d December, 1823, was a trader, etc.; and that in October, 1824, he became bankrupt, and on the 27th May, 1825, obtained his certificate. Demurrer to so much of the plea as related to the sum of £500 first mentioned.

The Solicitor-General in support of the demurrer.<sup>1</sup>

Chitty, *contra*. But it appears that the plaintiff has no right to sue; for the replication shows that after the agreement he became bankrupt, and consequently the right of action vested in his assignees. [Bayley, J. The plea of set-off goes to the whole declaration, the replication of the plaintiff's bankruptcy only to part of the plea. The demurrer is to the residue; and upon this demurrer the defendant cannot avail himself of the replication.]

Abbott, C. J. Then as to the other point it is said that the plaintiff upon certain parts of the record has set forth his bankruptcy, and that as it appears upon the whole record that his assignees are entitled to the benefit of the contract stated in the declaration, the plaintiff cannot have judgment upon this demurrer. But in considering what judgment we are to pronounce upon this demurrer, we are bound to look only to that part of the record upon which the demurrer arises, and not at the other collateral parts of the record not connected with it; and, looking to that part of the record upon which the demurrer arises, we are of opinion that the plaintiff is entitled to the judgment of the court.

Bayley, J. As to the other point, in arguing the question whether the defendant or the plaintiff is entitled to judgment upon this demurrer, neither of them has a right to have recourse to any parts of the record not connected with that upon which the demurrer arises. If the defendant had intended to rely on the bankruptcy as a bar to the plaintiff's right to recover, he should have pleaded it; and the plaintiff in that case might have replied that the assignees had repudiated the contract.

<sup>1</sup> Only so much of the case is given as relates to the effect of the demurrer. — ED.

Holroyd, J. I entirely agree with my brother Bayley that the defendant cannot claim in aid the other parts of the record, to show that the plaintiff is not entitled to judgment upon the demurrer.

Littledale, J. Then it is said that the plaintiff has no right of action, because it appears upon the record that he had become bankrupt. As to one sum, the plaintiff says, "that he has obtained his certificate." Then he demurs to the other parts of the plea. But supposing anything turned on the question of bankruptcy, we should be bound to decide on the plea and demurrer following one another. We must treat the count, plea, and replication, and the count, plea, and demurrer, as distinct records, and give judgment upon each without reference to the other.

Judgment for the plaintiff.

## THE AUBURN AND OWASCO CANAL CO. v. LEITCH.

SUPREME COURT, NEW YORK. JANUARY, 1847.

REPORTED IN 4 DENIO, 65.

Demurrer to a replication. The declaration was in assumpsit for the recovery of certain instalments due upon shares of the capital stock of the plaintiff's corporation, subscribed for by the defendant. Pleas, 1. Non-assumpsit. 2. *Nul tiel corporation*. Replication to the second plea, setting out the act incorporating the plaintiff, together with certain acts amending and continuing that act. The defendant demurred to the replication, and the plaintiff joined in demurrer.

W. H. Seward, for the defendant.

B. D. Noxon, for the plaintiff.

By the court, Bronson, C. J. The defendant insists that the declaration is bad on general demurrer. [The Chief Justice then examined the pleadings, and came to the conclusion that the declaration was substantially defective; and then proceeded as follows:] But it is said, that as the defendant pleaded non-assumpsit as well as nul tiel corporation, he cannot upon this demurrer go back and attack the declaration; and several cases have been cited to sustain that position. But it will be found on examination that the point has never been directly and necessarily adjudged. The doctrine was first started in *Wheeler v. Curtis*, 11 Wend. 653, and was there supposed to result from the well-established rule that the defendant cannot both plead and demur to the same count. It was said that the defendant should not be allowed to do indirectly what he would

have no right to do directly. But the question whether the declaration was good or bad was not decided. The cause went off upon other grounds; and the point in question was not necessarily settled. In *Dearborn v. Kent*, 14 Wend. 183, the *dictum* in the first case was repeated; but it was expressly held that the declaration was sufficient; so that it was wholly unnecessary to inquire whether the defendant was at liberty to make the question or not. *Russell v. Rogers*, 15 Wend. 351, is the next case; and there it was not decided whether the declaration was good or bad. It was apparently good; so that the point in question did not necessarily arise. In *Miller v. Maxwell*, 16 Wend. 9, this doctrine was mentioned for the last time; and the same learned judge who first started it went a great way towards knocking it on the head. In that case the defendant pleaded the general issue, and two special pleas. The plaintiff demurred to the special pleas, and they were adjudged bad; but the defendant was allowed to go back and attack the declaration; and judgment was given against the plaintiff for the insufficiency of that pleading. Now, although the learned judge who delivered the opinion of the court took a distinction between a defect in the declaration which would not be cured by a verdict, and one which could only be reached by a demurrer, the principle of that case is directly opposed to the *dicta* which had preceded it.

It is quite clear that the defendant cannot both plead and demur to the same count. And it is equally clear that, at the common law, he could not have two pleas to the same count. Indeed, the two things, though stated in different words, are only parts of one common-law rule; to wit, that the defendant cannot make two answers to the same pleading. The statute of 4 and 5 Anne, c. 16, was made to remedy this inconvenience; and it allowed the defendant, with the leave of the court, to plead as many several matters as he should think necessary for his defence. With us, leave of the court is no longer necessary. 2 R. S. 352, s. 9. The statute does not say that the defendant may both plead and demur; and consequently he cannot make two such answers. But he may plead two or more pleas; some of which may terminate in issues of fact, to be tried by a jury; while others may result in issues of law, to be determined by the court. And whenever we come to a demurrer, whether it be to the plea, replication, rejoinder, or still further onward, the rule is to give judgment against the party who committed the first fault in pleading, if the fault be such as would make the pleading bad on general demurrer. This rule has always prevailed. It was the rule prior to the statute of Anne; and to say that the defendant, because he pleads two pleas, one of which re-

sults in a demurrer, cannot go back and attack the declaration, would be to deprive him of a portion of the privilege which the legislature intended to confer. He cannot plead and demur at the same time, because the common law forbids it; and the statute does not allow it. But he may plead two pleas; and he takes the right with all its legitimate consequences, one of which is, that whenever there comes a demurrer upon either of the two lines of pleading, he may run back upon that line to see which party committed the first fault; and against that party judgment will be rendered. Aside from the *dicta* in question, there is not a shadow of authority, either here or in England, for a different doctrine.

Although it seems that no case upon this point has found its way into the books, I well remember that since the decision in *Miller v. Maxwell*, 16 Wend. 9, it has been several times announced from the bench that in a case like this the defendant was at liberty to go back and attack the declaration; and I think the point has been more than once directly decided. I know that the late Mr. Justice Cowen entertained and expressed that opinion, as I did myself; and it is also the opinion of my present associates. I would not lightly overrule so much as a mere *dictum*, if it was of the nature of a rule of property, and had stood long enough to become one. But this is not a question of that kind.

Judgment for the defendant.<sup>1</sup>

### CAMPBELL v. ST. JOHN.

IN THE KING'S BENCH. 1694.

REPORTED 1 SALKELD, 219.

In trover for a box and 290 pieces *argenti*, the defendant demurred to the declaration, and the plaintiff demurred to the defendant's demurrer, and concluded *& hoc paratus est verificare*; the defendant maintained his demurrer, and put the matter upon the court. And first, the court held that trover would lie for plate generally. *Vide* Style, 224, 264.<sup>2</sup> Secondly, That all is discontin-

<sup>1</sup> "Ordinarily a demurrer to a pleading which is held good cannot be carried back to a previous defective pleading. *Dearborn v. Kent*, 14 Wend. 183. But if the declaration is materially and fatally defective, the demurrer will be carried back. *People v. City of Spring Valley*, 129 Ill. 169; *Fort Dearborn Lodge v. Klein*, 115 Ill. 177. It is generally said that a demurrer will not be carried back of the general issue. *Dearborn v. Kent*, 14 Wend. 183; *Compton v. People*, 86 Ill. 176. But this position would not seem tenable when the declaration is substantially defective so as not to be good after verdict. *Auburn & O. Canal Co. v. Leitch*, 4 Den. 65; *Shaw v. Tobias*, 3 N. Y. 188." Stephen, Pleading, Andrew's 1st ed. 224.

<sup>2</sup> "In the infancy of this action, it was held necessary, in a declaration in trover, to ascertain the goods which were the subjects of dispute, with as much certainty and



ued by the plaintiff's not joining in demurrer, but demurring upon the defendant's demurrer; for there is no difference between pleading over when issue is offered, and not joining in demurrer, but pleading over; both are alike, and make a discontinuance.

# HAITON AND OTHERS, ASSIGNEES, v. JEFFREYS.

IN THE KING'S BENCH. 1715.

10 MODERN REPORTS, \*280.

The court was moved for leave to plead a plea, and demur to the declaration at the same time, upon the 4 Anne, c. 16, s. 1, the words of which are, "That it shall be lawful for any defendant, or tenant in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto, as he shall think necessary for his defence: provided nevertheless, that if any such matter shall, upon a demurrer joined, be judged insufficient, costs, etc." 1705

The court. The words of the Act of Parliament are, "that it shall be lawful to plead as many several matters, etc." Now, a demurrer is so far from being a plea that it is an excuse for not pleading. Here you plead, and at the same time pray that you may not plead. The word "matter" imports a possibility that the other party may demur to it; but there can be no demurrer upon a demurrer. This was never attempted before.

accuracy, as was required in an action of detinue or replevin. Therefore where the declaration was for a parcel of lings, without specifying the quantity it contained, though there was a verdict and judgment in favor of the plaintiff, it was reversed upon error. *Gramvel v. Rhobotham*, Cro. Eliz. 865. So trover for 200 weights of lead, and 200 weights of brass, without showing the quantity, was held too uncertain after verdict. *Powell v. Hopkins*, Sty. 247. *Walter v. Farrier*, S. P. Latch. 216. . . . But the law does not now require so much precision and certainty in the description of the goods, as formerly; for if they are described according to common acceptance, it is sufficient. Thus trover for 400 'ends' of deal boards was adjudged to be sufficient, because workmen call all such pieces of boards, as are not fit for wainscoting, flooring, and the like, 'ends'; and being a particular term well understood, is a proper denomination for all short pieces of boards. *Knight v. Barker*, 2 Ld. Raym. 1219; 11 Mod. 66, s. c. Greater certainty, however, and accuracy in the description of the things demanded, is still required in detinue, because the plaintiff may desire to recover the specific things themselves, which can only be done in this action. *Kettle v. Bromsall*, Willes Rep. 120. But with respect to replevin, . . . it seems to be now settled that a declaration being certain to a general intent, is sufficient after verdict. *Rast*. 570 b; *Dalt. Sher.* 274." 2 Williams Saunders, 74, note.

4. *What are Demurrers to Evidence and what are Special Verdicts.*

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(a) *Demurrers to Evidence.*

WRIGHT v. PAUL PINDAR.

IN THE KING'S BENCH. 1647.

REPORTED ALEYN, 18.

In a trover and conversion brought by an administrator; upon not guilty pleaded, the defendant upon the evidence confesses, that he did convert them to his own use; but further saith, that the intestate was indebted to the king, and that 18 May, 14 Car., it was found by Inquisition, that he died possessed of the goods in question; which being returned, a *venditioni exponas* was awarded to the sheriff, who by virtue thereof sold them to the defendant. And to prove this the defendant showed the warrant of the treasurer, and the office book in the Exchequer, and the entry of the Inquisition, and the *venditioni exponas* in the clerk's book; to which the plaintiff saith, that the matter alleged is not sufficient to prove the defendant not guilty; and that there was no such writ of *venditioni exponas*. And the defendant saith, that the matter is sufficient, and that there was such a writ. And it was resolved, that he that demurs upon the evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court. And if the matter of fact be uncertainly alleged, or that it be doubtful whether it be true or no, because offered to be proved only by presumptions and probabilities, and the other party will demur thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of fact to be true. And for that the defendant did not so in this case, both parties have misbehaved themselves, and the court cannot proceed to judgment. But it was clearly agreed, that upon evidence the court for reasonable cause, at their discretion, may permit any matter to be shown to prove a record. Com. 411 b. And the opinion of the court was, that an *alias venire facias* should be awarded, and not a *venire de novo*, because no verdict was given.

(b) *Special Verdict.*

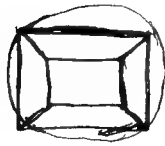
"A more common, because more convenient, course than [demurrer to the evidence] to determine the legal effect of the evidence, is to obtain from the jury a special verdict in lieu of that general one, of which the form has already been described. For the jury have an option, instead of finding the negative or affirmative of the issue, as in a general verdict, to find all the facts of the case as disclosed upon the evidence before them, and after so setting them forth to say, in effect, 'that they are ignorant, in point of law, upon which side they ought, upon these facts, to find the issue; that if, upon the whole matter, the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, etc.; but if the court are of an opposite opinion, then *vice versa*.' This form of finding is called a special verdict." Stephen, Pleading, Andrews' 1st ed., 180.

## GENERAL DEMURRER.

C. D. } And the said C. D. by E. F. his attorney, comes and  
 ats. } defends the wrong and injury, when, &c., and says that the  
 A. B. } said declaration (or "the said first count of the said declaration") and the matters therein contained in manner and form, as the same are above stated and set forth, are not sufficient in law for the said A. B. to have or maintain his aforesaid action thereof against him, the said C. D. and that he the said C. D. is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore, for want of a sufficient declaration or ("first count of the said declaration") in this behalf, the said C. D. prays judgment, and that the said A. B. may be barred from having or maintaining his aforesaid action thereof against him, &c. 2 Chit. Pl. 678.

## SPECIAL DEMURRER.

When the causes of demurrer are stated, as is in general advisable, proceed as in the above precedent to the end, and then as follows: And the said C. D., according to the form of the statute in such case made and provided, states, and shows to the court here, the following causes of demurrer to the said declaration, or "to the said first count of the said declaration," that is to say, that, &c. (here state the particular causes, and conclude thus: and also that the said declaration, or "first count of the said declaration") is in other respects uncertain, informal, and insufficient, &c. 2 Chit. Pl. 678.



## CHAPTER VIII.

### DILATORY PLEAS.

"THE more general division of pleas is, . . . first, pleas dilatory; secondly, pleas peremptory. Of the former description are pleas to the jurisdiction; to the disability of the person; to the count, or declaration [obsolete] and to the writ; of the latter, or peremptory kind, and which lead to an issue which finally settles the dispute, are pleas in bar of the action." Chitty's Pleading, Vol. I. p. \*457.

"The law has prescribed and settled the order of pleading which the defendant is to pursue, and although it has been objected that as regards pleas in abatement the division is more subtle than useful, yet as regulating in some respects the forms and conclusions of the pleas, and the right to plead another plea in abatement in some cases after judgment against the defendant of *respondeas ouster*, it is deemed here expedient to adhere to the ancient order, especially as no preferable arrangement has been suggested, viz.:

- 1st. To the jurisdiction of the court. *another action*
- 2dly. To the disability, etc., of the person. *alien enemy*
  - 1st. Of the plaintiff.
  - 2dly. Of the defendant. *married women under such disability in some*
- 3dly. To the count or declaration [obsolete]. *states*
- 4thly. To the writ.
  - 1st. To the form of the writ.
    - 1st. Matter apparent on the face of it. *Obsolete*
    - 2dly. Matter dehors. *Party who ought to be joined with it has not*
  - 2dly. To the action of the writ. *be joined. also*
- 5thly. To the action itself in bar thereof. *misnomer. made class of pleas in bar.*

Chitty's Pleading, Vol. I. p. \*456.

(a) *To the Jurisdiction.*DOULSON *v.* MATTHEWS AND ANOTHER.<sup>1</sup>

IN THE KING'S BENCH. 1792.

REPORTED 4 TERM REPORTS, 503.

This was an action of trespass for entering the plaintiff's dwelling-house in Canada, and expelling him; there was another count for taking his goods; but as there was no proof to support the second count, the only question was, whether an action of trespass could be brought in this country for the injury stated in the first count. Lord Kenyon, at the trial, was clearly of opinion that the cause of action stated in that count was local. And as the plaintiff could not support the second count, he was nonsuited.

Erskine now moved to set aside that nonsuit; observing, that this was not an action to recover the land, but merely a personal action to recover a satisfaction in damages, which was transitory and might be tried here.

Buller, J. It is now too late for us to inquire whether it were wise and politic to make a distinction between transitory and local actions; it is sufficient for the courts that the law has settled the distinction, and that an action *quare clausum fregit* is local. We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local.

Rule refused.

JEREMIAH LAWRENCE *v.* DANIEL SMITH AND  
ABRAHAM RUSSELL, JUN.SUPREME JUDICIAL COURT OF MASSACHUSETTS. SEPTEMBER  
TERM, 1809.

REPORTED 5 MASSACHUSETTS, 362.

This action was assumpsit, in which the defendants are described as of the city, county, and State of New York. The service endorsed is an attachment of nominal property [a chip] of the defendants, and the leaving of a summons with their attorney, William P. Walker.

<sup>1</sup> A part of Erskine's argument, and also Ch. J. Kenyon's opinion, are omitted.  
—ED.

The defendants, by their said attorney, plead to the jurisdiction of the court, because they are inhabitants of the state of New York, and at no time have been resident within this state, and that no estate of theirs has been attached on this writ.

To this plea the plaintiff demurs, and the defendants, by the same attorney, join in demurrer.

By the court. As a plea in abatement to the jurisdiction, the plea is unquestionably bad, as it gives jurisdiction to no other court of this state. But the Court will not proceed in the suit, as it does not appear that either of the defendants, or any estate of theirs, is within the jurisdiction of the commonwealth.

Let an entry be made that the plea is adjudged bad; and let a further entry be made that, for the reasons aforesaid, all further proceedings stay.

Hurbert, for the plaintiffs.

Dewey, for the defendants.

[Confer Statutes of 1797, c. 50, s. 1, Massachusetts.]

(b) *To the Disability of the Person.*

PLUMPTON *v.* HEADLAM.

THE TRANSACTIONS OF THE HIGH COURT OF CHANCERY.

REPORTED TOTHILL'S CHANCERY REPORTS, 74.

Plumpton *contra* Headlam, demurrer because excommunicated, overruled, about 4 Car.

MORRIS *v.* OWEN.

THE TRANSACTIONS OF THE HIGH COURT OF CHANCERY.

REPORTED TOTHILL'S CHANCERY REPORTS, 76.

Morris *contra* Owen, a demurrer, because the plaintiff was outlawed, the defendant ordered to answer, 10 Jac. C. B. (fo. 457).

DOCKMINIQUE *v.* DAVENANT.

IN THE QUEEN'S BENCH. 1704.

REPORTED 1 SALKELD, 220.

*Per curiam.* If a defendant demur in abatement, the court will notwithstanding give a final judgment, because there cannot be a demurrer in abatement; for if the matter of abatement be extrin-

ANONYMOUS.

Reported 1 Wilson, 302.

The defendant pleads in abatement that there is no such person as the plaintiff<sup>1</sup> in *rerum natura*, the plaintiff replies that there is, viz. at Westminster; defendant demurs, plaintiff joins in demurrer and prays judgment and his damages, which being in chief is wrong, for it ought to be that he may answer over. *Per curiam*. Let it stand over with leave to the plaintiff to move to amend on payment of costs.

LADY FAULKLAND *v.* STANION.

REPORTED 12 MODERN, 400.

In debt upon a bond, it was pleaded in bar, that in a former action upon that bond the defendant had pleaded the late statute of the king laying taxes upon bonds for security of money, and that none should recover such debts if they had not taxed the same; and that upon that plea the plaintiff was barred.

It was objected, that the statute was only a temporary law, and now expired; and therefore the impediments being removed, the plaintiff should recover, and compared it to the case of excommunication pleaded, where the judgment is *remaneat loquela sine die quousque*, etc., which is but a temporary plea, by which the parties are put out of court, but may be brought in by a re-summons or re-attachment; but where outlawry is pleaded in abatement after pardon or reversal thereof, the party must begin *de novo*.

But by Holt, Chief Justice, Here the defendant had a good plea when the first action commenced, and time shall not wear it out; and he said, that Co. Lit 128 b and 135 b is to be understood upon this diversity, when the cause of action accrues to the plaintiff at a time at which he is under the disability of an outlawry; there the plea of outlawry in abatement shall quite overthrow the writ, and after removal thereof he must begin *de novo*; but where the disability of outlawry comes after the cause of action accrued, there

<sup>1</sup> That is, a man without a name.

1500

the plea of outlawry is only a temporary disability which does not abate the writ, but is only *quousque*: and after removal thereof he may re-continue the action by re-summons, etc.

(c) *To the Count or Declaration.*

JOSEPH HOLE *v.* JOHN FINCH.

IN THE KING'S BENCH. 1769.

REPORTED 2 WILSON, 393.<sup>1</sup>

*Curia*: Formerly, when the whole original writ was spread in the same roll with the count thereupon, if a variance appeared between the writ and count, the defendant might have taken advantage thereof, either by motion in arrest of judgment, writ of error, plea in abatement, or demurrer. Cro. Eliz. 185, 198, 330, 829; 2 Lutw. 1181, s. p. But afterwards it was determined that if the defendant will take advantage of a variance between the writ and count, he must demand *oyer* of the writ, and show it to the court. 4 Mod. 246; Ellery *v.* Hicks and Ux<sup>r</sup>; 2 Salk. 658, 701; 6 Mod. 303. And a case in manuscript of Gross *v.* Lee, which was replevin by writ for taking his cattle, the count was for taking a gray horse, there was a demurrer for the variance, but judgment was for the plaintiff. Parker, C. J., cited Salk. 701, and the court held that defendant cannot take advantage of a variance between the writ and count without showing *oyer* of the writ.

(d) *To the Writ.*

1. *Misnomer.*

MESTAER AND ANOTHER *QUI TAM*, ETC., *v.* HERTZ.

IN THE KING'S BENCH. 1815.

REPORTED 3 MAULE AND SELWYN, 450.

Lord Ellenborough, C. J. [in the above case, said], "In what situation do these plaintiffs stand? They have described the defendant by a wrong name, having perhaps heard him called by that name once or twice. But that would not be sufficient to maintain an issue upon the misnomer; because whether his name be so or not, depends not upon one or two occasions, but on a plurality of times that he may have been so called. Perhaps they might have

<sup>1</sup> Extract from the opinion of the court. The statement of facts is omitted.



doubts upon a matter not lying within their own cognizance, but they venture to call him into court by a particular name. The defendant appears and being in court pleads a misnomer, and then the plaintiffs, having something given them to amend by, apply for leave to amend, instead of encountering the peril of an issue which probably would have turned out against them, and would have been conclusive. . . . Now here the cause of action is precisely the same, whether the name of the defendant be Moses Isaac, or Maurice Jacob. The court, in allowing the plaintiffs to amend, makes compensation to the defendant by giving him the costs of his plea, and to the plaintiffs they afford an opportunity of not being totally excluded from the merits. Considering the extent to which amendments of this sort have been allowed, the present seems to me to come within the practice, and the principle laid down by Lord Hardwicke."

### HAWORTH *v.* SPRAGGS.

IN THE KING'S BENCH. 1800.

REPORTED 8 TERM REPORTS, 515.

The defendant was sued in an action of assumpsit by the name of John Spraggs; to which he pleaded in abatement as follows: "And he against whom the plaintiff hath exhibited his bill by the name of John Spraggs in his proper person comes and pleads that he was baptized by the name of James, to wit, at, etc., and by the Christian name of James hath always since his baptism hitherto been called and known, etc.;" traversing in the usual form that he was ever known by the Christian name of John. The plaintiff demurred, and assigned for special causes that by the manner of pleading the said James had by his said plea admitted himself to be the person named the defendant in and by the aforesaid bill of the plaintiff, and also that the said James had not begun his said plea in the words following, viz. "and James Spraggs against whom," etc., in the usual and known mode of pleading a plea a misnomer in abatement, etc.

Manley, in support of the demurrer.

Reader, *contra*.

The court said at any rate the plea was defective, in not setting out the surname as well as the christian name of the defendant. That such a plea must inform the plaintiff what is the true name of the defendant: whereas, here the defendant corrected the plaintiff's mistake as to his christian name, but neither admitted that he

was rightly designated by his surname, nor called himself by any other surname.

Judgment *respondeat ouster*.

### REX v. THOMAS FOSTER.

REPORTED RUSSELL AND RYAN, 412.

The prisoner was tried before Mr. Baron Garrow at the Maidstone Lent assizes in the year 1820, for committing an unnatural crime on one John Whyneard.

The person on whom this crime was convicted said that his name was spelt Winyard, but it was pronounced Winnyard.

The prisoner was convicted, and received sentence of death; but execution was respited, in order that the opinion of The Judges might be taken on the objection that the name of the witness was misspelt.

In Easter Term, 1820, The Judges took this case into consideration, and held the conviction right.

### REGINA v. JAMES.

CENTRAL CRIMINAL COURT. 1847.

REPORTED 2 COX CRIMINAL CASES, 227.

The indictment charged the prisoner with assaulting and stealing from a female "two rings, etc., the property of Jules Henry Steiner." The female was the wife of the owner of the property, and stated that, to the best of her knowledge, her husband's name was Henry Jules Steiner, and not Jules Henry Steiner.

Pollock, C. B., held the misnomer fatal, and the prisoner was acquitted.

### REGINA v. DAVIS.

CROWN CASES RESERVED. 1851.

REPORTED 5 COX CRIMINAL CASES, 237.

The case was reserved by the Dorsetshire Sessions.

The prisoner was indicted for stealing the goods of Darius Christopher. The evidence proved the prosecutor's name to be Tryus Christopher. The chairman ruled that, in Dorsetshire, Darius and Tryus were *idem sonantia*, but requested the opinion of the judges upon the correctness of that ruling. When this case came on to

be heard, on the 8th February, before Jervis, C. J., Alderson, B., Williams, J., Platt, B., and Martin, B., the court intimated that it was a question for the jury, and directed the case to be sent back, in order that it might be stated whether the question had been left to the jury. The case was now returned, with a statement that the question of variance was not left to the jury.

Lord Campbell, C. J. — This conviction must be reversed. If it is put as a matter of law, it is quite impossible for this court to say that the two words are *idem sonantia*. The objection is said to have been taken in arrest of judgment; but I have never heard of such a ground for arresting the judgment since the great case of *Stradley v. Styles*.

Coleridge, J. No doubt a Dorsetshire jury would have thought the words *idem sonantia*.

Conviction reversed.

[*Extract from*]

REGINA *v.* WILSON.

CROWN CASE RESERVED. 1848.

REPORTED 2 COX CRIMINAL CASES, 426.

Per W. B. Brett, for the prisoner. "Upon the point of variance the law is clear; and the only question is, whether the Court can say that the two names are so identical in sound that no person could be misled."

JONES *v.* MACQUILLIN.

IN THE KING'S BENCH. 1793.

REPORTED 5 TERM REPORTS, 195.

The declaration was against the defendant by the christian name of James Richard; to which there was a plea in abatement that he was baptized by the name of Richard James, and not James Richard, and had always since been known by the christian name of Richard James, etc. To which there was a general demurrer, and joinder.

Shepherd, in support of the demurrer, said, that the plea was insufficient, because it did not deny that the defendant had been christened by the names of James and of Richard, though not in the order in which the plaintiff had stated them. If it were to be taken all as one name, there might be some color for the objection; but the Court would take notice that there were two distinct names, by

both of which it appeared that the defendant had been baptized. And this would have appeared still more strongly if the plea had been drawn in the usual form ; for it should have stated that the defendant had not been baptized by the names of James and Richard, which would clearly not have availed. But

*Per curiam.* The objection cannot be got over: the misplacing of the names makes them as different from the real names as the substitution of any other instead of these.

Judgment for the defendant.

### AHITBOL *v.* BENIDITTO.

IN THE KING'S BENCH. 1810.

REPORTED 2 TAUNTON, 401.

But in this case, where Aaron Beniditto had been sued and arrested by the name of Aaron Benedetto, . . . the court said it was *idem sonans*, and refused the rule [*nisi*, because of no misnomer].

### 2. *Autre Action Pendant.*

### BILLER *v.* ELLIOT.

THE TRANSACTIONS OF THE HIGH COURT OF CHANCERY.

REPORTED TOTHILL'S CHANCERY REPORTS, 73.

Biller *contra* Elliot, demurrer, because the matter was depending in the Exchequer, before the bill [,] overruled, Jan. 35 Eliz.

### SPARRY'S CASE.<sup>1</sup>

IN THE EXCHEQUER. 1590.

REPORTED 5 COKE, 61 *a*.

A man shall not be twice vexed for one and the same cause.

Israel Owen brought an action on the case against James Sparry, of trover of a certain quantity of cotton yarn, and selling it to persons unknown, and conversion to his own use ; the defendant pleaded, that the plaintiff had another action on the case depending in the King's Bench for the same trover and conversion of the same goods ; and this suit is prosecuted pending the other ; and demanded

<sup>1</sup> Part of the opinion is omitted.

judgment of the bill : and thereupon the plaintiff did demur in law. And it was resolved by Sir Roger Manwood, Chief Baron, and the whole Court of Exchequer, that the bill should abate for two reasons.

1. Because by the rule of law a man shall not be twice vexed for one and the same cause, *nemo debet bis vexari, si constet curiæ quod sit pro una & eadem causa*. But the old difference in our old books is between writs which comprehend certainty, as in debt, detinue, etc., and writs which comprehend no certainty, as assize, trespass, etc. For it is true that in writs (be they real, personal, or mixt), which are certain, it is a good plea to say, that the writ is brought pending another, but in writs real or personal, where no certainty is contained, there it is no plea. . . .

Also it was resolved, that although the first action was in another court, *scil.* in the King's Bench, or *vice versa*, that the plea is good, *vide* 43 Edw. III. 27 a, acc. and that the book in 34 Edw. III. Brief 789, is good law ; for it doth not appear by the plea, that the plaintiff or defendant was privileged in the Exchequer, and then by the statute of *Articuli super chartas*, cap. 4, it is enacted, that no common plea shall be held in the Exchequer ; but in 43 Edw. III. 27 a, it appears that the defendant was privileged in the Exchequer, and therefore the plea to the writ there was good. But if a man brings an action of debt by bill in London or Norwich, or in any other inferior court, and afterwards brings an action of debt in the Common Pleas, this suit in the higher court, which is brought pending the suit by bill in an inferior court, shall not abate, as appears in 7 Hen. IV. 8 a, and 3 Hen. VI. 15 a, b ; *vide* 43 Edw. III. 22, 27, and 7 Hen. IV. 44 a, b, Bringingham's Case. But it is said in 9 Edw. IV. 53 a, that all the king's courts at Westminster have been time out of mind, etc., and so a man cannot tell which of them is the most ancient court.

And afterwards it was adjudged that the plea was good, and the plaintiff took nothing by his bill. And so note, reader ; all the books which *primâ facie* seem to disagree are on full and solid reason unanimously agreed and reconciled.

## JONATHAN WILBUR, EXECUTOR, v. JOHN GILMORE.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1838.

REPORTED 21 PICKERING, 251.

But the mischoice of an action does not extinguish the right to have the proper action.

Trespass *quare clausum*. The action was submitted to referees, under a rule of court. They awarded to the plaintiff the sum of

\$5, as the actual value of wood and timber cut and carried away by the defendant, and submitted to the determination of the Court the legal questions arising in the case.

The trespass was committed in the lifetime of the plaintiff's testator. In the year 1835, the plaintiff commenced a suit against the defendant for the same cause of action. To that suit there was a general demurrer and rejoinder in the Court of Common Pleas, and judgment was there rendered that the declaration was bad and that the defendant recover his costs. The defendant insisted that those proceedings were a bar to the present action.

The present action was commenced by the executor after the revised Statutes went into operation, and another question submitted to the Court by the referees was, whether it could be legally commenced by the executor.

If the Court should be of opinion that the former proceedings were not a bar to this suit, and that the plaintiff had a right to maintain this action, judgment was to be entered that the award in favor of the plaintiff be accepted; and if otherwise, the defendant was to recover his costs according to the award.

Colby, for the plaintiff.

Coffin and Pratt, for the defendant.

Morton, J., said, in part, as follows:

2. The former judgment was rendered on a general demurrer to the declaration, and is no bar to this action.

The general rule undoubtedly is, that the judgment in one action shall bar all other suits between the same parties and for the same cause of action. Interest *reipublicae ut sit finis litium*. But this rule is limited to judgments rendered on the merits. If the plaintiff be nonsuit for want of proof, or because his *allegata* and *probata* do not agree, or for any other cause, he may commence another action. 1 Chitty on Pl. (5th ed.) 227; Gould on Pl. 478. Even a judgment of nonsuit on the merits, or on an agreed statement of facts, has been holden to be no bar to another action. *Knox v. Waldoborough*, 5 Greenl. 185; *Bridge et al. v. Sumner*, 1 Pick. 371. So if the plaintiff mistake the form of his action, as if he bring trespass instead of trover, and his writ be adjudged bad on demurrer, the judgment will not bar an action of trover. 1 Chit. Pl. (5th ed.) 227; Gould on Pl. 478, s. 46. So if the plaintiff mistake his cause of action and the defendant demur and have judgment, this will not preclude the plaintiff from commencing a fresh action, correctly setting forth the right cause. So also if the declaration be demurred to, or a bad plea be pleaded and demurred to, and a judgment be rendered against the plaintiff for the insuffi-

ciency of his declaration, it will not estop the plaintiff from bringing another action to enforce the same right; because the case as stated in the last declaration was not tried in the first. In all these cases, if the defendant plead the former judgment in bar, the plaintiff may reply that it was not obtained on the merits. 1 Chit. Pl. (5th ed.) 227; Gould on Pl. 478, s. 45; Vin. Abr. Judgment (Q. 4); Lampen v. Kedgewin, 1 Mod. 207. In this last case, North, C. J., says, "there is no question but that if a man mistakes his declaration and the defendant demurs, the plaintiff may set it right in a second action."

It is apparent from the record, that the former judgment between these parties was rendered upon the insufficiency of the declaration and not upon the merits of the case, and therefore can be no bar to the present action.

Award of referees accepted.

### ABEL PARKER, JUDGE OF PROBATE, v. DANIEL COLCORD.

SUPREME COURT OF NEW HAMPSHIRE, CHESHIRE, MAY TERM. 1819.

REPORTED 2 NEW HAMPSHIRE, 36.

[Extract from the opinion of Woodbury, J.] "There is some apparent contrariety in the books as to the meaning of the words *lis pendens*, or 'the pendency of a suit.' But whether a suit be pending by the purchase of a writ, (1) or the service of it; (2) or the filing of bail; (3) or the entry of the action; (4),—all these events had happened in the first suit, prior to the commencement of the present one."

### FOWLER v. BYRD.

SUPERIOR COURT, TERRITORY OF ARKANSAS. FEBRUARY, 1833.

REPORTED FEDERAL CASES, No. 4999 A, BY SAMUEL H. HEMPSTEAD, Esq.

A suit is pending by the purchase of a writ.

Clayton, J. This was an action of debt, brought by Richard C. Byrd against Absalom Fowler, in the Circuit Court of Pulaski County, in which the defence set up was a plea of the pending of a former suit for the same cause of action. The circuit court permitted the clerk to prove by parol that the writ in the former suit had been dismissed, overruled the plea, and gave judgment for the plaintiff; from which judgment an appeal was taken to this court.

In chancery it is settled, that a *lis pendens* is created by filing a bill and actual service of the subpoena. 2 Madd. 256; 1 Johns. Ch. 566.

At law, suing out a writ constitutes the pendency of a suit, without any further step, and neither service of process, nor any other proceeding, is required to form the ground of a plea of another action pending for the same cause. 1 Bac. Abr. 23; 5 Coke 48, 51. The plea of another action pending is an affirmative plea, and casts the *onus probandi* upon the defendant pleading it, and the proof to sustain it must be record evidence. 1 Saund. Pl. & Ev. 19. A record is a memorial of a proceeding or act of a court of record, entered in a roll for the preservation of it. 7 Com. Dig. tit. "Record" A. When, in this case, the defendant in the court below showed the issuing of a writ for the same cause of action, he proved, *prima facie*, at least, the pendency of a suit; and it then devolved on the plaintiff to prove, by competent testimony, that the suit had been disposed of, and was no longer pending. The parol evidence introduced for the purpose was not, in our opinion, legal. *Brush v. Taggart*, 7 Johns. 20; *Hasbrouck v. Baker*, 10 Johns. 248; *Jenner v. Joliffe*, 6 Johns. 9. Had he moved for leave to enter at that time a dismissal of the first writ, or an order directing the clerk to make out upon the record a statement of the facts and dismissal, as they had actually occurred, *nunc pro tunc*, we think upon that state of the case the plaintiff would have been entitled to succeed. But failure to do so, and the attempt to supply the omission by parol testimony, constitutes such an error as to warrant the reversal of the judgment.

It is probable that even now, the plaintiff, by entering of record a dismissal of the first suit in the circuit court, will be entitled to have judgment in that court. Judgment reversed.

### BROWN *v.* VAN DUZEN.<sup>1</sup>

SUPREME COURT OF THE STATE OF NEW YORK. OCTOBER, 1814.

REPORTED 11 JOHNSON, 472.

A suit is pending by the service of a writ.

In error, from the Court of Common Pleas of Orange County. This was an action of debt on a recognizance for fifty dollars, taken before a justice of the peace, upon a plea of title, pursuant to the tenth section of the twenty-five-dollar act, brought by Brown against Van Duzen, who wasimpleaded with Reynolds. In the action

<sup>1</sup> The arguments of counsel are omitted.



before the justice, Brown was plaintiff, and Reynolds defendant, and Van Duzen entered into the recognizance as surety for Reynolds. The breach assigned by the plaintiff in his declaration was that Reynolds did not appear and put in bail, at the next Court of Common Pleas, to a suit commenced against him by the plaintiff, according to the condition of the recognizance. The defendant pleaded *nil debet*, and gave notice of evidence that the plaintiff had discharged the recognizance.

The plaintiff produced and proved the recognizance, and that he issued a writ in trespass, in the Orange County Common Pleas, returnable at the next term after the recognizance was taken, which, in consequence of the death of the deputy sheriff shortly after it was delivered to him, was lost, and the defendant therein had never been arrested. The plaintiff attempted to prove that the deputy sheriff endeavored to serve the writ, and that Reynolds eluded him, and kept himself armed to prevent an arrest.

The defendant, Van Duzen, went into evidence to show that the issuing the writ against Reynolds was a feigned proceeding; and declarations and acknowledgments by the plaintiff were proved, to this effect: "that it was in his power to have taken Reynolds, if he wished, but that it was not his intention to do so, and that he had some other person in view to charge." To this evidence the plaintiff objected, and on his objection being overruled, the bill of exceptions was taken. The jury below gave a verdict for the defendant.

Fisk, for the plaintiff in error.

C. Ruggles, *contra*.

Platt, J., delivered the opinion of the court. It was incumbent on the plaintiff to prove: 1, The recognizance; and 2, That he commenced a suit for the trespass, before the next term of the common pleas.

Whether merely issuing the writ and delivering it to the sheriff to be served, without actual service, and without an *alias* and *pluries capias*, can be deemed a commencement of the suit, in the sense of this recognizance; and whether the recognizance ought not to be taken to the people, are questions which need not be decided in this case.

It was indispensably necessary for the plaintiff to prove at least the delivery of the writ to the proper officer, with a *bona fide* intention of having it served; and if the defendant could show that it was a feigned proceeding, without intention on the part of the plaintiff to have it served, or could show ground to presume that the plaintiff had instructed the officer not to serve the writ, it was

pertinent evidence; because it went to disprove "the commencement of the suit," in the largest sense of the phrase.

If the plaintiff could have succeeded in proving the suit commenced, he would have recovered fifty dollars of the surety, without encountering the plea of title set up by Reynolds. Hence the materiality of that evidence.

The counsel have argued the case as though the evidence offered by the defendant was intended to operate as a direct release or discharge of the recognizance, whereas it goes to contradict an essential averment in the declaration; to wit, the commencement of the suit against Reynolds. In the latter view it was proper evidence; and the judgment below ought to be affirmed.

Judgment affirmed.

### TATLOW OR CASTLE *v.* BATEMENT.

IN THE KING'S BENCH. 1671.

REPORTED 2 LEVINZ, 13.

A suit is pending upon the filing of bail.

Trover; and upon *non cul'*, verdict for the plaintiff; and it was moved in arrest of judgment, that the action is brought before the cause of action accrued; for the conversion is laid at a day in Easter Term, and the declaration is generally as of Easter Term, and not at a day certain (as by *memorana quod tali*, etc., it may be), and then this must relate to the first day of the term. But *per cur'*, 't is well enough if the bail was filed after the cause of action accrued, for here no action can be depending, nor declaration delivered, until the defendant be *in custodia Marescalli*, and that is never till bail filed, which filing is at a day certain. Upon which it was referred to Livesay, the Secondary, to examine when the bail was filed. Saunders, for the defendant.

### JAMES H. BULLOCK *v.* EDWIN A. BOLLES.

SUPREME COURT OF RHODE ISLAND, OCTOBER TERM. 1870.

REPORTED 9 RHODE ISLAND, 501.

A suit is pending upon the entry of the action.

Assumpsit upon a promissory note.

Brayton, C. J. This action is brought to recover of the defendant the amount of a promissory note made by him, and payable to

the plaintiff, for the sum of \$300, and the declaration also contains the common money counts for the sum of \$300. The action was commenced at the March Term, 1870, of the Supreme Court for this county, by the service of the writ upon the defendant on the 24th day of January, 1870.

And the defendant has pleaded in abatement that, on the 20th day of December preceding, the plaintiff sued out a writ from the Court of Common Pleas, to be holden at Providence, within and for the county of Providence, on the first Monday of June, 1870, in which writ the defendant was impleaded in an action of the case for the same cause as in the writ and declaration in this action, and that the parties were the same (the said Bullock and the said Bolles), and that the writ sued out of the Court of Common Pleas was duly served upon defendant, and remains in full force and undetermined.

To this plea the plaintiff has filed a general demurrer, and, the plea being one in abatement, the demurrer is, in effect, as to this plea, special. And the question is, if there be any defect in the plea which can be reached by a special demurrer.

The defect of this plea, it is objected, is, that it does not appear by the pleading that the prior action in which the defendant is alleged to have been interpleaded was ever matter of record, and that it is necessary that it should be of record to be matter of abatement, and be referred to by saying, "as by the record remaining thereof in said court appears," giving the plaintiff the opportunity to reply, "*nul tiel record*."

In support of this the plaintiff has cited the case of *Clifford v. Coney*, 1 Mass. 494, which holds that the plea must state matter on record, and refer to it as by the record thereof, etc. Another case cited is *Commonwealth v. Churchill*, 5 Mass. 174, affirming the first, and holding that the writ in the suit pleaded in abatement, before it can be pleaded, must be returned and entered, and that until then it cannot be said to be pending in court.

We have been furnished with no authority to the contrary by the defendant's counsel, and he replies only by urging that he has alleged "the suing out the writ from the Court of Common Pleas wherein he is impleaded, its service upon the defendant, and that it is still undetermined." This does not seem to us a sufficient reply; it does not impugn the cases or distinguish between them and the case at bar.

A writ not returned, say the books, is not matter of record. If not returned, the writ itself must be produced, and can no otherwise be proved. If it has been returned, then it is a record, it may

be proved as every other record may, by an examined copy. 2 Starkie, 285.

Buller (N. P. 234) says, if a writ be matter of inducement only, it may be proved by the production of the writ itself, without a copy of the record; but when the writ is the gist of the action, you must have a copy of the record; inasmuch as you must have the utmost evidence the nature of the thing is capable of, and it cannot become the gist of the action till its return.

Bacon's Abridgment, treating of pleas of this kind, lays down the rule that when it appears of record that another action is pending for the same matter, it may be pleaded in abatement. All the cases are consistent with the rule as thus laid down in Sparry's Case, 5 Co. 61.

The old difference in the books was between writs which comprehend certainty, a debt determined, and writs which comprehend no certainty, as in writs of trespass for goods, assize, etc. If certain, it is a good plea to say the writ is brought pending another; but in writs personal or mixed, where no certainty is contained, then it is no plea. But after declaration it is made certain, and then the plea is good; the generality is reduced to certainty.

No question seems to have been made as to writs never returned. All the cases are of writs returned when the plaintiff had not declared, as by the English practice he was not required to do, till after the return of the writ, and sometimes long after.

In the case referred to in Coke as example (22 Hen. VI. 52) it was part of the plea that the plaintiff had declared in a writ of trespass, and as this had made it certain, the plea was held good; but in 20 Hen. VI. 445, the plea was held bad in that it did not aver that the plaintiff had declared in trespass. In an assize of Novel disseisin, 14 Edw. III. 270, the plea was another writ depending, of the same tenements, between the same parties. The writ of assize was held good, the plea bad, because the plaint was not made in the first writ, so that *non potest constare* of what tenement it was.

In *Queen v. Harris*, Cro. Eliz. 261, *prior reforme* was pleaded; objection, no writ alleged to have issued; answer, on the filing of the information it became matter of record without any process, so it is not like other writs. It is immediately depending, though no writ.

In *Armitage v. Row*, 12 Mod. 91, there was a motion by the defendant that the plaintiff might file his original writ and enter up the issue on the record, for he had been arrested three times for the same cause, and he doubted if he might plead another action pend-

ing with a joint *petit per recordum* before it. The issue was entered up. *Per curiam*: He may; and if he do not enter it you may, without any motion in court, give a rule to enter it. The marginal note is that it may be pleaded, another action pending before the issue is entered up. But the whole matter was in court, and the court were dealing with it, so that they could make an order in it upon the parties. The motion itself shows the understanding of the counsel and the court, that it was necessary, to the validity of the plea, that the case should be so pending in court that the party could of the allegation say, "as by the record remaining in said court appears."

With the rule as stated in Bacon, all the precedents of this plea agree. They all state that the party was impleaded, not in the writ, but in the court, naming the court and the term thereof. They all assume that the action is in that court, pending in it, became a matter of record there; so that it may be properly said of the matter pleaded, that it appears of record.

It is necessary to allege in what court the action is depending; for if it be not in some of the superior courts, but in a court of inferior jurisdiction, it is not pleadable in abatement. And so are all the precedents.

Demurrer sustained.

### JOSEPH CLIFFORD *v.* JASON D. CONY.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE TERM. 1805.

REPORTED 1 MASSACHUSETTS, 495.

When is the prior action to be pending? At the time of the plea filed.

This was an action which was brought into this court by appeal from a judgment of the Court of Common Pleas in this county, holden on the 3d Tuesday of May last. The declaration was as follows, viz.: "Jason D. Cony, a deputy sheriff in and for said county, was attached to answer to Joseph Clifford in a plea of debt, for that whereas one Theophilus Hamblin, by the consideration of the justices of the Supreme Judicial Court, holden at Augusta, within and for the said county of Kennebeck, on the first Tuesday of June, in the year of our Lord one thousand eight hundred and four, recovered judgment against the plaintiff for the sum of sixteen dollars and twelve cents debt and costs of suit, taxed at fourteen dollars and eighty-three cents, being thirty dollars and ninety-five cents in the whole; and the said Hamblin, afterwards, on the twenty-fifth day of June, in the same year, sued out a writ of execution in due

form of law against the plaintiff for the recovery of the aforesaid sum; and afterwards, on the twenty-eighth day of the same month of June, the plaintiff paid the said Hamblin fourteen dollars and seventy cents, part of the sum due on said execution, which sum was then and there indorsed on said execution; and the said Hamblin, afterwards on the twenty-fifth day of October, in the same year, delivered the said writ of execution to the said Cony, then and there being a deputy sheriff in and for said county as aforesaid, with the sum of fifteen dollars, and no more due, thereon; and the said Cony afterwards, on the tenth day of October, in the same year, at —, aforesaid, he then and there being a deputy sheriff as aforesaid, did then and there wilfully and corruptly demand and receive of the plaintiff the sum of four dollars for and as his fee on and for the collection of said execution or the sum then due thereon as aforesaid; which sum exceeds the fees established by a law of this commonwealth; whereby the said Cony hath forfeited the sum of thirty dollars to the use of the plaintiff, who brings the action for the recovery of the same. Yet the said Cony, though often requested, the same sum has not paid, but detains it; to the damage of the said Clifford, as he saith, the sum of fifty dollars."

The writ in this action was tested the 27th day of April, 1805, was served on the defendant, Cony, the 6th of May following, and returnable to the Court of Common Pleas on the third Tuesday of the same month. The defendant appeared and pleaded in the Court of Common Pleas as follows, viz.: "And the said Cony, by Bridge and Williams, his attornies, comes and defends the force and injury when, etc., and prays judgment of the plaintiff's writ and declaration aforesaid, and that the same may be quashed, because he says, that after committing of the said supposed offence in the same declaration mentioned, and long before the day of the commencement of the plaintiff's action thereof against the said Cony, to wit, on the eighth day of April, in the year of our Lord one thousand eight hundred and five, at said —, the right of action for the same supposed offence was attached in one John Brooks, and that the said Brooks, there afterwards on the same day, sued forth out of the clerk's office of said Court of Common Pleas, a certain writ against him, the said Cony, directed to the coroners of the county of Kennebeck aforesaid, by which said writ the said coroners were commanded to attach the goods and estate of the said Cony, and to have him, the said Cony, before the said Court of Common Pleas, then next to be holden at Augusta, within and for the said county on the third Tuesday of May, to answer to the said Brooks in a plea of debt, and that the said coroners then and there should have that

writ; and that afterwards, and before the return of the said writ, and before the said Clifford's writ was served upon him, the said Cony, and before he, the said Cony, had any notice of that writ's being sued out, or intended to be sued out, to wit, on the 8th day of April aforesaid, he, the said Cony, was served with said writ so sued out by the said Brooks, and in obedience to the said writ, he, the said Cony, according to the course and practice of the said court, at the return of the said writ so sued out by the said Brooks, appeared in the said court here to answer to the said writ so sued out by the said Brooks; and that thereupon the said Brooks, at this term of this court, to wit, on the third Tuesday of May instant, exhibited his writ aforesaid against the said Cony in due form for the recovery of the supposed debt by him demanded as aforesaid. And the said Cony says, that the said Brooks' action aforesaid, against him, the said Cony, is for the same cause of action, and for the same identical supposed offence as that complained of in the plaintiff's declaration aforesaid; and this the said Cony is ready to verify; wherefore he, as before, prays judgment of the said writ and declaration of the said Clifford, and that the same may be quashed, and for his costs."

To this plea the plaintiff demurred generally, and the defendant joined in demurrer. The demurrer concluded thus: "Wherefore, for want of a sufficient answer in this behalf, the said Clifford prays judgment, and his debt aforesaid with his damages by reason of the detention of that debt to be adjudged to him."<sup>1</sup>

The judgment in the Court of Common Pleas, which was rendered by consent of the parties, without argument and merely for the purpose of bringing the action immediately to this court by appeal, was that the plea in abatement was good and sufficient in law to abate the plaintiff's writ and declaration; and that the same should be quashed, and that the defendant should recover his costs. From which judgment the plaintiff appealed, and entered the same in this court.

P. Mellen, for the plaintiff.<sup>2</sup>

Wilde, for the defendant, referred to the case of *Coombe v. Pitt*, 3 Bur. 1423, to show that the plea in abatement was sufficient. It is sufficient to show by the plea that at the time of the purchase of the writ, the plaintiff had no right; this is done; and no subsequent event shall place him in a better situation than he was when he commenced his action. In *Bac. Abr. Pleas and Pleadings*, F. 11,

<sup>1</sup> *Quære* if this was not a discontinuance. See *Com. Dig. Pleader*, Will. II. 1 Salk. 177, 218. Lill. Ent. 9, marginal note.

<sup>2</sup> Mellen's argument as to the second objection to the plea is omitted.

it is said that "where the plaintiff has sued out two writs against the same defendant for the same thing, the first not being determined, the second writ shall abate; and it is not necessary that both should be pending at the time of the defendant's pleading in abatement, for if there was a writ in being at the time of suing out the second, it is plain the second was vexatious and ill *ab initio*, and therefore could not be rectified by a subsequent determination of the first." The precedents which have been cited from Lilly are all of former actions commenced by the same person; and although the pleas state the pendency of the former actions, yet, according to the rule in Bac. Abr. it was not necessary; nothing therefore can be inferred merely from the form of pleading in those cases. Suing out a writ in cases of this nature attaches a right in the person who purchases the writ; and a discontinuance, etc., if it existed, ought to be shown by the other side. But here it sufficiently appears that the first action was entered and pending at the time of the plea filed. The plea states that the first writ was returnable to the Court of Common Pleas to be holden on the third Tuesday of May, and the defendant, in obedience to the writ, according to the course and practice of the court, at the return of the writ, appeared in the court to answer to the same, and that the plaintiff, at the same term (the term in which the plea in abatement was filed), exhibited his writ aforesaid against the defendant in due form, etc.; the whole term is, in law, but one day; and therefore it substantially appears that the first action was pending at the time of the plea filed; that it was pending in the same term at the same time. If the plea be not correct in point of form, yet it is sufficient on a general demurrer; and it would be very hard to compel the defendant to answer to a second action for a mistake in pleading, a mistake merely in form, and which ought to have been pointed out as cause of demurrer, that he might stop in season, and amend; which is the true reason why mistakes in form cannot be taken advantage of on a general demurrer.

But in this case the plaintiff's declaration is bad, and therefore it is of no consequence whether the plea be good or not. [Court. We do not take notice of defects in the declaration upon a demurrer to a plea in abatement.] Wilde. The facts relied upon by the defendant might have been pleaded in bar,<sup>1</sup> and therefore the rule of strict construction, as to pleas in abatement in general, is applicable to the present case.

Mellen, in reply. It has been contended that pendency of the first action need not be averred in a plea, and that the negative

<sup>1</sup> *Quære* of this.



must come from the other side. This is contrary to all rules of pleading, and is expressly contradicted by the authorities cited for the plaintiff. But it is said that it does appear by the plea that the former action was pending, and the allegation respecting the exhibition of the writ, etc., is relied on. There is no certainty in that allegation; the plea does not even allege that the action was entered. The records, here, always state that the action was entered. If it be contended that exhibiting means entering, then the plea ought to have averred that that action was entered previous to the entry of the present; and then, perhaps, it might compare with the English practice of filing a declaration. But we know nothing, in our practice, of exhibiting and filing, in the sense of their proceedings. Our practice is totally different; and an action cannot, here, be shown to be pending otherwise than by averring that the same was entered, and still remains in the court undetermined.

It was not necessary to demur specially; it is never necessary to a plea in abatement. There is a late case, reported by Durnford and East, in which it was so decided.<sup>1</sup>

The substance of the defence is pendency of the former action, which if not averred there is nothing averred which can avail the defendant; and it not being alleged that the proceedings appear of record, as it ought to have been, the plaintiff can neither have *oyer* nor reply *nul tuel record*.

Thacher, J. The plea does not, in my opinion, show that the former action was pending; it is therefore insufficient. A special demurrer was not necessary; I have never known one to a plea in abatement.

Sewall, J. I am not satisfied that the first objection ought to avail; because I am inclined to think that it does appear by the plea that the former action was pending. But as there is no reference to the record, and as the party has the right of replying to such record, which he cannot do in this case for want of such reference in the plea, I am also of opinion that it is bad; and whether the defect is in form or substance is immaterial; for want of form, in a plea in abatement, may, as I think, be taken advantage of on a general demurrer.

Sedgwick, J. The greatest exactness is required in pleas in abatement; because no plea which goes to prevent a discussion of the merits of the case ought to be favored. In the present case, the

<sup>1</sup> *Quere* if *Buddle v. Wilson*, 3 T. Rep. 369, was not the case intended. It was there decided that a plea in abatement after a general imparlance is bad, and may be taken advantage of on a general demurrer.

defendant was bound to show clearly, and past all dispute, that the former action was pending at the time of the plea filed. This does not appear. Every fact stated in the plea may be admitted to be true, and yet that action might have been previously discontinued. On the other point, the plea ought to have referred to the record. As the plea is, in my opinion, bad on both grounds, there must be

Judgment of *respondeat ouster*.

X

### COMMONWEALTH v. ASAPH CHURCHILL.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM. 1809.

REPORTED 5 MASSACHUSETTS, 174.

When is the prior action pending? When it becomes matter of record.

This was an indictment against the defendant for corruptly taking usurious interest upon a loan of money to one Ebenezer Clough. The pleadings, as far as they apply to the question before the court, will appear in the summary account with which the opinion of the court was introduced, as the same was delivered by

Parsons, C. J. On the second day of April last, Luther Eames sued an action of the case *qui tam* against the defendant to recover a penalty for taking usurious interest against the statute of 1783, c. 55, by which it is provided that the penalty may be recovered by indictment, or by action on the case, one moiety to any person who may prosecute for the same. At the Common Pleas a verdict was found for the defendant, and the plaintiff appealed from the judgment rendered thereon. He entered his appeal at the last November Term of this court, at which term an indictment was found against the defendant for taking unlawful interest. To this indictment the defendant pleaded the former action of Eames against him then pending an abatement, with the usual averments that the action and indictment were for the same offence, and to recover the same penalty. After this plea was filed, Eames in the prior action became nonsuit. Afterwards, but in the same term, the Solicitor-General replies the subsequent nonsuit. To this replication there is a demurrer, which is joined.

The first question arises on the validity of the replication. The Solicitor-General might have replied that the civil action was sued by fraud and covin between the parties; and as he has not, but has chosen to confess and avoid it, that action must be considered as prosecuted *bonâ fide*. The merits of a plea, so far as they depend on the allegation of facts, must be determined by the law and the

facts existing when the plea is pleaded ; and I do not recollect any case where a plea can be confessed and avoided by a posterior fact done by a party not pleading it. For pleas after the last continuance stand on different principles. Now, if the plea must be taken to be true when the replication was filed, and if, when pleaded, it was sufficient to abate the indictment, a fact happening afterwards cannot make an indictment, which was once abateable by law, good. I therefore lay the subsequent nonsuit in the first action out of the case, and shall consider the sufficiency of the plea. And if a former action pending for the same penalty is sufficient to abate an indictment to recover the same penalty, then, if the averments in the plea are formal and regular, it is good.

It is very well known that a man cannot bring a second action for the same cause for which he has a prior action pending. The same rule extends to *qui tam* actions, where the plaintiffs are different, if the cause of the two actions is the same. The same reason will extend the rule to informations *qui tam*, and to indictments to recover forfeitures on penal statutes, but not either to informations or indictments for crimes. *Rex v. Stratton et al.*, Doug. 240 ; *Rex v. Swan and Jeffry*, Fost. 104. As to informations for penalties, it was determined in *Regina v. Harris*, Cro. Eliz. 261, that an information on the statute of 5 Edw. VI. for buying wood, etc., filed in the King's Bench, when there was pending in the Common Pleas a prior information by one Lewis for the same offence, must abate. And *Hawkins*, Hawk. P. C. B. 2, c. 26, s. 63, lays down the law generally, that whenever any suit on a penal statute may be said to be actually pending, it may be pleaded in abatement of a subsequent prosecution, being expressly averred to be for the same offence. Now, an indictment is a prosecution, and an expensive one, for the defendant may be arrested and imprisoned, or held to bail ; and if acquitted, he cannot recover costs.

The reason of this rule is well expressed in a familiar law maxim, *Nemo debet bis vexari, si constet curiae, quod sit pro una et eadem causa*. But an indictment to recover a penalty on a penal statute, and an action *qui tam*, may certainly appear to be for the same cause, and the former may be the most vexatious.

If it be objected that, because it does not appear on what day the plea was filed, it cannot be known that the civil action was pending when the plea was pleaded : it may be answered, that the plea contains an averment that the action was then pending, and this averment is not traversed. For if the allegation was denied, the Solicitor-General, instead of replying (as he has) that Eames was nonsuit on the forty-third day of the term, should have replied

*nul tiel record.* It however appears that the replication was not pleaded before the sixteenth day of January last, fifty-six days after the term commenced. But even if it did not sufficiently appear that Eames was nonsuit after the plea in abatement was filed, it would not be material, as it certainly appears that the civil action was pending when the indictment was returned and filed.

I believe that it has been sometimes supposed that in pleading in abatement to a second writ the pendency of a former one, the former must be pending at the time of the plea. The entries of pleas of this kind generally, but not always, aver the then pendency of the first writ: but in examining the books it is very clear that such averment is unnecessary; and it is sufficient if the first action was pending when the second writ was purchased.

In the 39 Hen. VI. 12, pl. 16,<sup>1</sup> this point is discussed and settled

<sup>1</sup> “As the year-books are not frequently to be met with in our libraries, the reporter has thought that the insertion of the following case at large would gratify many of the profession, as a specimen of the juridical proceedings of former times, and the rather as its authority has been frequently acknowledged, and as it was mentioned with so much respect by his honor, the Chief Justice. 39 Hen. VI. 12, pl. 16.

“In a writ of detinue, the plaintiff by Choke counted of a box sealed with charters, and of one charter in special. Billing demanded judgment of the writ, because he said that heretofore, viz. on the 1st of January, in the 38th year of the king that now is, the plaintiff sued such a writ of detinue as this against the defendant, returnable before the justices of the Common Bench here at Westminster, at the Utas of St. Hilary, the process continued, and he showed how, until the day after ascension then next following, and the parties appeared in court and the plaintiff counted against the defendant for wrongfully detaining a sealed box of charters, and of one charter in special: which writ was abated, and he shows how, and for what cause, and also the whole record in certain, and shows that they were the same box, and were the same charters of which he has now counted: and he saith that this writ was purchased pending the other, and he demands judgment, etc.

“Choke. This is no plea without saying that it is still pending, and inasmuch as you yourself have confessed that the other writ is abated, he demands judgment if this writ shall abate.

“Prisot. It seems to me that this writ shall abate, because it was purchased pending the other, and albeit that the other be abated, it is now to no purpose. For the law will not suffer a man to be impleaded twice for the same thing *simul et semel* by several writs: for in a plea of land, if a writ be purchased pending another, it shall abate: so in detinue, covenant, and writs of this kind, where the certainty of the demand appears by the writ. But it is otherwise in an action of trespass, for there the certainty of the thing doth not appear, no more than in an assize, for the writ there is *de libero tenemento*, which determines nothing certain. So a writ of trespass or an assize purchased pending another shall not abate without plaint. But if a man has two assizes pending, and he is demanded in one assize and is nonsuit, and after he is demanded in the other assize, and he appears and makes his plaint, now this writ shall not abate, although the tenant alleges that this writ was purchased pending the other to which he was nonsuit *causa qua supra*. But if he be demanded in the first assize, and he appear and make his plaint, if now he will be nonsuit to the first assize, the second assize shall abate, because the certainty appears in the plaint as well as if it was a *precipe quod reddat*. And, sir, although this first writ was abated, still the second was purchased pending the other, at which time it was abatable; and although he was

with much learning and ingenuity. It was holden that it must appear of record that the two actions are for the same cause, and that the first writ was pending when the second was purchased. When the certainty of the cause of action does not appear in the writ, nor until the plaintiff has declared, if the first action was non-

after nonsuit to the first writ, that will not make this writ good, which was once abatable. Therefore, etc.

“Moile. In a plea of land it is as you say, that if one writ be purchased pending another, it shall abate, and that has always been the usage. But the usage is otherwise in pleas personal; for it was never holden to be a plea in a personal action to say that this writ was purchased pending another, unless he said that the other is still pending, and then it shall abate; because the law will not suffer a man to be impleaded for the same thing by two divers writs, whether in debt or trespass. But when the other is abated, there is now no mischief, and so there is a diversity between pleas real and personal.

“Ashton. It seems to me that the writ shall not abate, unless the other was still pending, because there is now no mischief when the other is abated, for now he is impleaded but by one writ, and has but one writ pending against him; therefore there is no reason that the writ should abate. But if the other writ had been still pending, there would be reason to abate this writ, because he shall not be vexed nor troubled for the same thing by two several writs, but when the other is abated, this mischief is at an end, therefore, etc.

“Prisot. There is no other reason that one writ of *precipe quod reddat* purchased pending another should abate, but that he should not be impleaded for the same thing by two several writs; and there is the same reason in a plea personal of a thing certain. And as to what is said, there is now no mischief because the other writ is not pending, it is not so. For if two several writs for the same thing be purchased, then he shall lose issues on both writs: so whenever it appears that he has twice been arrested on *capias*, then he has mischief by the vexation of the process, as he would by the plea, and the mischief is the same. And I lay it down that if one purchases two assizes against me, bearing date the same day, and returnable on the same day, and the plaintiff appears to both, both shall abate; and so of a *precipe quod reddat*, and of a plea personal. And if one purchase two personal writs against me, one of an earlier date than the other, and he is nonsuited to the oldest writ before declaration, the second shall abate, so here. Therefore, etc.

“Danby. It is not so, if he be nonsuit before declaration, the second is then good enough; because it is not certain what debt or charters he demands before he count by the first writ which is abated. But when he once appears and declares in the first writ, the second writ is abated which was purchased pending the first. And so in your case, if the two writs bore the same date, and were returnable the same day, it is not true that both should abate; for if he would be nonsuit as to one, the other should stand (which Nedham granted), but in the case at bar the plaintiff counted on the first writ, and this writ was purchased pending the first, and the plaintiff doth not deny that it was for the same thing; in which case this writ of necessity ought to abate. And as to what is said, that it shall stand because the other writ is abated, this is to no purpose. For when a writ is once abatable by law, the plaintiff can himself do nothing to make it good, and so the writ shall abate.

“Littleton. The same reason which you give in a plea personal before declaration may be given in a plea real before declaration.

“Nedham. It is not so. For in a plea of land, he shall be summoned in the land demanded, and by the summons it will be asserted what land he demands before his count; but it is not so in a plea personal, viz. in debt or detinue, for he will not be summoned by the debt in demand, nor by the chattels demanded; and therefore it cannot be asserted before the count: and this is the diversity, *quod notā.*”

sued before he counted, the first writ could not be pleaded in abatement of the second, for it could not appear from the record that the two writs were for the same cause. But if the cause of action appear with certainty in the writ, there if the plaintiff be nonsuit before he counted, the second writ would abate. And in all cases when the plaintiff was nonsuit to the first writ after he had counted, the second should abate, if purchased pending the first. And it was not necessary that the first writ should be pending when the plea was pleaded; for if by law it was once abateable, the subsequent nonsuit could not make it good.<sup>1</sup>

This law is recognized in 5 Co. 61, Sparry's Case, and in Gilb. Hist. of C. B. 205, 206, and cited in 3 Instr. Cler. 118. In Cro. Eliz. 261, it is said that an information is pending as soon as it is brought into court, and before process on it issue. For the cause of bringing it is certainly alleged in it, and it is recorded as soon as brought into court.

By the course of proceedings in our courts, the count being inserted in, and making a part of the writ, the plaintiff does not count after his appearance to his writ; and if he be nonsuit at any time, the writ may be said to be once depending. As in nonsuits at common law, after appearance to writs containing the cause of action in certainty, the writs were once pending because the plaintiffs had appeared, so it would seem to be necessary here that the plaintiff should enter his action before his writ can be averred to be pending in court, so as to abate a subsequent writ. For its pendency must be a matter of record, and there can be no record of a nonsuit, unless the plaintiff be called after he has appeared in court and entered his action. Therefore a subsequent writ is not abateable, unless the plaintiff enter his action on his prior writ.

But it is objected that this rule of law applies only to cases where the two writs are sued for the same cause by the same plaintiff; and that it will not apply to *qui tam* actions sued by different plaintiffs, or to informations *qui tam* for the benefit of different persons, or to a subsequent indictment to recover the same penalty.<sup>2</sup>

The reason of the law applies to these cases, which is to prevent a man from being twice vexed for the same cause: and the principle, by applying the rule, certainly extends to these cases. The

<sup>1</sup> The opinions of Moile and Ashton are the most reasonable; and for authority in support of them, see *Green v. Watts*, 1 Ld. Ray. 274; *Knight's Case*, 2 Ld. Ray. 1014; 1 Salk. 329; 1 Went. 8; *Clifford v. Cory*, 1 Mass. 495; *Marston v. Lawrence*, 1 Johns. Cas. 397; Hawk. B. 2, ch. 26, s. 63; Doug. 240. See, too, the precedents in pleading.

<sup>2</sup> The defendant in an indictment cannot plead the pendency of the former indictment, founded upon the same transaction, in abatement. 1 Starkie, Crim. Plead. 314, 2d ed. Foster, 104, 106.

principle is, when the prior action is pending, the subsequent writ is bad *ab initio*; it is wrongly sued out, as not given by the penal statute, while another action is pending for the same cause. The statute may give a *qui tam* action, or information, or an indictment; but it does not provide that all these prosecutions may be pending at the same time. If it did, then the pendency of the former could in no case be cause to abate the latter, which is not contended for. When, therefore, a prosecution given by the statute is regularly pending, no other prosecution is, during the pendency of the former, authorized by the statute. Therefore the second prosecution is irregular, and unauthorized at its commencement: and if once abatable, it seems very clear that no subsequent act of the first prosecutor, after his suit is pending, can make the institution of the second regular and legal.

It may be said that extending the rule to *qui tam* actions and informations, and to indictments on penal statutes to recover a forfeiture, may introduce fraud and covin: for the first prosecutor may continue to prosecute until the limitation of penal suits shall take effect, and may then become nonsuit, and the second prosecution being abated, the penal statute will be defeated.

Let us examine this objection. The second prosecutor, when the pendency of the first is pleaded in abatement, may reply that the first was by fraud and covin between the parties, and if the fraud be found, the plea will be avoided. But if a fraud not capable of proof may be presumed, still the objection will fail; for the fraudulent first prosecutor will not become nonsuit or discontinue, until the second prosecution is in fact abated. Therefore extending the rule to a nonsuit after appearance, and before plea pleaded, will not tend to introduce fraud: neither will the confining of the rule to cases where the former suit is pending when the plea is pleaded, or when the second suit is abated, tend to exclude fraud. For let the rule be settled, and fraudulent parties will always conform to it.

We are, therefore, of opinion that the plea is sufficient to abate the indictment, if the averments in the plea are regular. It is averred that the writ and indictment are for the same cause, and to recover the same penalty. Now, on comparing the plea and the indictment together, if it substantially appears that they are for different causes, the averment is bad, because it is against the record.

The offence charged in the indictment is the taking of unlawful interest on a loan of 400 dollars to Ebenezer Clough by a contract to be performed in ninety days from the 19th of August, 1807. In looking into the plea, the offence charged in the declaration to the first writ is the taking of unlawful interest on a loan of 400 dollars

to Ebenezer Clough, by a contract to be performed in ninety-three days from the 19th of August, 1807. These contracts are not the same, but are substantially different. And the averment that they are the same is an averment against the record, which the law will not allow. For this cause only, we think the plea in abatement is bad, and that the defendant must answer further to the indictment.

If the Solicitor-General, on looking into the evidence, should find that the grand jury have mistaken the effect of the contract, and that in fact it was to be performed in ninety days with grace, he will determine, whether the ends of justice can be answered by further prosecuting the indictment.

After the opinion of the court was thus delivered, Sedgwick, J., observed that he had not been able to bring his mind to a decision of the point in question; but as the rest of the court were very clear, he did not wish to suggest doubts, which might in any degree tend to weaken the authority of the opinion given. He said he did not recollect a case, in which a popular action had been held to abate an indictment for the same cause, unless the civil action was actually pending at the time of the plea pleaded. He expressed an apprehension that in consequence of this decision, the statute against usury would be virtually repealed. Perhaps this effect was not to be lamented. If the pendency of a *qui tam* action is to prevent a prosecution for usury by the government, unless collusion can be proved, a discreet usurer will always save himself from a penalty to which he apprehends himself exposed, by procuring an action to be instituted by some confidential friend, which shall stand continued for two years, and then be discontinued, and by this method absolutely eviscerate the statute. Perhaps the positive rules of law furnish him this screen. If they do, it is for the legislature only to remedy the evil. Whether, however, they do or not, he had formed no opinion.

Note. The Solicitor-General afterwards entered a *nolo prosequi* upon the indictment, being satisfied that the same note was intended in the two several processes. *Vide* 1 Starkie, Crim. Plead. 314; Foster, 104-106.

Note. "It may be laid down as a universal rule, applicable both to actions *ex contractu* and *ex delicto*, that if one person sues alone, when the right of action is in two or more, jointly, or if two or more sue as co-plaintiffs when the right of action is in one of them only, the mistake is pleadable in abatement. . . . The nonjoinder . . . and the misjoinder [of defendant's] . . . is, in all cases, pleadable in the same manner." Gould, Pl., c. v., secs. 103, 104. As to when such errors may be availed of by demurrer, motion in arrest of judgment, or writ of error, see Gould, Pl., c. v., secs. 105-121.



*Judgments on Dilatory Pleas.*

TOMPSON v. COLIER.

IN THE KING'S BENCH. 1607.

REPORTED YELVERTON, 112.

The plaintiff declared on a lease made by Robinson and Stone of a messuage and forty acres of land, in the parish of Stone, in the county of Stafford; the defendant imparled to another term, and then pleaded that within the parish of Stone there are three vills, A., B., and C., and because the plaintiff did not show in which of the vills the land lay, he demanded judgment of the bill, *et quod ob causam prædict. billa prædict. cassetur*: and the plaintiff demurred upon the plea; and it was adjudged for the plaintiff: for, 1. The defendant cannot plead in abatement of the bill after an imparlance, for he has admitted it to be good by his entering into defence, and by his imparlance. 2. The matter of the plea is not good because the defendant does not show in which of the vills the messuage and forty acres lie; and that he ought to do; for where a man pleads in abatement, he ought always to give the plaintiff a better writ. *Quod nota.* But *per tot curiam* his plea does not go in bar, but only a *respondeat ouster*. And by Williams, Just., the difference is, that where the plaintiff demurs on a plea in abatement, and where he goes to issue upon it; for if they go to issue upon such plea, and it is found against the defendant, it is peremptory, and he loses the land; but upon a demurrer it is not peremptory, but only a *respondeat ouster*. *Quod nota.* Vide 22, 1 H. 55 b; Foxley's Case, 5 Co. 111.

WALLIS v. SAVIL *et al.*<sup>1</sup>

IN THE COMMON PLEAS. 1506.

REPORTED NELSON'S LUTWYCHE, 16.

Matter in abatement ought not to be made the basis of a judgment in bar.

York, Ss. Trespass against three defendants.

All of them plead the general issue as to part, and as to the residue they plead in bar, that the plaintiff brought an action, etc., against two of the three defendants and others, for the same tres-

<sup>1</sup> Cf. same case, "Demurrers, Special and General," where a part of the case not quote here is reported.

pass, and they conclude their plea in bar; and it was held ill, because all three of the defendants had pleaded an action depending against two of them, and said nothing to the third; and though the matter itself was properly pleadable in abatement and not in bar, the judgment was *quod* (the plaintiff) *recuperet damna*, etc.

And to prove that judgment final shall be given upon a plea in bar, where the subject-matter is only in abatement, these cases were cited.

Ss. A man was bound in an obligation to three persons, and two of them bring an action of debt; the defendant pleaded in bar, that he became bound to these two, and to another. This is matter in abatement only, but yet judgment final was given. [Cro. Eliz. 202; Sid. 189.]

So where debt was brought against an executor, the defendant pleaded in bar that he was administrator; this should have been pleaded in abatement, but being in bar the plaintiff had judgment *quod recuperet debitum*, etc. 1 Mod. 239.

Style in his Practical Register tells us, that a plea which is properly in bar may be pleaded by way of abatement; and that which is proper in abatement may be pleaded in bar; but he says, this does not hold in all cases; and I think it holds in very few, for if it should be allowed, it would certainly introduce a great disorder in pleading.

This is my Lord Coke's opinion, that good matter ought to be pleaded in good form, otherwise great advantages may be lost, which appears plainly in this case, where good matter was pleaded in an ill form; that is, it was pleaded in bar, which is called by Bracton, and other old writers, *exceptio peremptoria*, in which judgment final may be given, and that destroys the action forever; whereas if it had been pleaded in abatement (as it ought), then the judgment would have been given against the plaintiff; his action would have only ceased for a time, and he might begin again by a new writ or plaint, as the case required.

### EICHORN v. LE'MAITRE.

IN THE COMMON PLEAS. 1768.

REPORTED 2 WILSON, 367.

But if an issue of fact on a dilatory plea is found against the party pleading it, the judgment is final.

Action upon the case upon several promises for goods sold and delivered; the defendant pleaded misnomer in his Christian name in

abatement; the plaintiff replied, that the defendant was called and known as well by the name of A. L. as by the name of B. L., and thereupon issue was joined; upon the trial the jury found a verdict for the plaintiff, but did not assess any damages. And now it was moved on the behalf of the plaintiff, that a writ of inquiry might issue to assess the damages; for that the defendant's plea being found to be false, the judgment to be given against him in this case must be peremptory and final; and there is no difference whether the ~~plea~~ pleaded be in bar or abatement; and for this purpose was cited *Bro. tit. Peremptorie*, Long 5 to Ed. IV. 90, b, where it is agreed for clear law, "That if a dilatory plea be pleaded to the writ, or to the count, or to the action *vel hujusmodi*, and they join issue, there always, if the issue pass against the tenant or defendant in an action real or personal, it is peremptory to the tenant or defendant." And the Long 5 to Ed. IV. 90, b, says, "it is peremptory, be the issue upon matter dilatory or upon matter in bar." For the defendant it was said, that although in real actions when issue is joined upon a dilatory plea, and tried by a jury, the judgment shall be final according to 1 Lev. 163, 1 Sid. 252, yet in a personal action, as this is, there shall be a *respondeas ouster*; and therefore a writ of enquiry of damages cannot be awarded. But, secondly, it was said for the defendant, that supposing the judgment to be given upon this issue found against the defendant must be final and peremptory, yet the omission of the jury in not finding damages in this case cannot be supplied by a writ of enquiry of damages, because if the jury upon the writ of enquiry should assess outrageous damages, an attaint would not lie, that being only an inquest of office; whereas an attaint would lie against the jury who tried the issue if they had given outrageous damages in this case; and the rule laid down in Cheney's Case, 10 Rep. 119, is, that the court will never *ex officio* award a writ of enquiry to supply the omission in the finding of the jury upon the trial, in a matter whereupon an attaint may be brought; and therefore if the judgment in this case is to be final and peremptory, the verdict is insufficient for the court to give judgment upon, and a writ of *venire facias de novo* ought to be awarded.

*Curia.* The first question is, whether the court upon this issue must pronounce a final and peremptory judgment, and if they must, the second question is, whether they can *ex officio* award a writ of enquiry to supply the omission of the jury, or whether a writ of *venire facias de novo* must not go; and we are all opinion that the judgment must be peremptory, and that there is no difference

whether the issue be joined upon a fact in a plea in abatement, or in a plea in bar, for wherever a man pleads a fact that he knows to be false, and a verdict be against him, the judgment ought to be final, and every man must be presumed to know whether his plea be true or false; but upon a demurrer to a plea in abatement there shall be a *respondeās ouster*, because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the court.

As to the second question, we are all of opinion that a writ of inquiry cannot be awarded to supply the omission of the jury in not finding damages, but that a *venire facias de novo* must go; “for where a man may have an attaint, there no damages shall be assessed by the court if they be not found by the jury.” 4 Leon. 245, Godb. 207. This is an *assumpsit* in which damages are the whole object of the writ and suit, and though issue be joined upon a fact in abatement, yet as to the defendant it is conclusive to all intents and purposes, and involves the damages upon finding the fact against him, and if outrageous damages had been given, an attaint would have laid; “In trespass, the defendant pleaded an arbitrement, and it was found against him; the court held that in trespass the whole recovery is damages, which cannot be taxed but by the inquest who passed upon the principal issue.” 11 Hen. IV. 57, b. A *venire facias de novo* was awarded.

### TIMOTHY GOOD *v.* JAMES LEHAN.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1851.

REPORTED 8 CUSHING, 301.

This was a writ of review, sued out from the Court of Common Pleas on the 28th of November, 1848, to reverse a judgment recovered in that court at the September Term, 1848, by Lehan, in an action brought by him against Good, in which action Good was defaulted.

At the December Term, 1849, of the Court of Common Pleas, Lehan pleaded in abatement of the writ of review, that the same had been materially altered and changed since the issuing of the same. Upon this fact of the material alteration, issue was joined and submitted to the jury, who returned a verdict, that the writ had not been materially altered and changed since the issuing of the same, in manner and form as the defendant in his plea in abatement had alleged. The plaintiff in review then moved for judgment on the verdict; and on this motion the case was con-

tinued to the March Term, 1850, when the court ordered that the parties should replead; but the defendant in review refusing to comply with this order, the court gave judgment for the plaintiff in review. And the defendant in review alleged exceptions to the ruling and orders of the court.

B. F. Butler, for the defendant in review.

F. Hilliard, for the plaintiff in review.

Fletcher, J. It is a well-settled and familiar principle of law, that if an issue of fact is joined to the jury on a plea in abatement, and found for the plaintiff, a judgment in chief should be entered in his favor. This rule extends to all dilatory pleas in civil actions. The plaintiff, therefore, in such cases should be prepared to prove his damages, but if the damages should not be found by the jury to whom the issue of fact is submitted, they may be assessed by the court, as upon default, or the question of damages may be submitted to another jury. The omission to have the damages assessed by the jury, who try the issue of fact, furnishes no sufficient ground for setting aside the verdict. *Boston Glass Manufactory v. Langdon*, 24 Pick. 49; *Frye v. Hinkley*, 6 Shepl. 320; 2 Greenl. Ev. s. 27; *Howe's Prac.* 215; *Gould Pl.* 300. This case very clearly comes within this well-established principle. Here was an issue of fact on a plea in abatement submitted to the jury and found for the plaintiff, and judgment in chief should, of course, have been entered for the plaintiff.

The exceptions of the defendant are therefore so far sustained as to set aside all the rulings, orders, and proceedings of the court subsequent to the verdict, and the action will stand in this court open to a motion on the part of the plaintiff for judgment in chief on the verdict.

#### PLEA IN ABATEMENT.

In the K. B. (or C. P.)

— Term, 48 Geo. III.

C. D. } And the said C. D. in his person, (or "by G. H. his attor-  
ats. } ney,") comes and defends the wrong and injury, when, &c.,  
A. B. } and prays judgment of the said bill (or "writ") of the said A.;  
because he says that the said A., before and at the time of the commencement of this suit, was and still is married to one E. F., then and yet her husband, who is still living, to wit, at, &c., aforesaid; and this he the said C. D. is ready to verify; wherefore, because he the said E. F. is not named in the said bill (or "writ") of the said A., the said C. D. prays judgment of the bill (or "writ") aforesaid, and the same may be quashed, &c. (Add the affidavit of the truth in substance.)  
2 Chit. Pl. 414.

## CHAPTER IX.

### PLEAS IN BAR.

- I. The General Issue.
- II. Pleas in Confession and Avoidance.
- III. Replication de Injuria and Special Traverse.

“ *Barre* is a word common as well to the English as to the French, of which commeth the nowne, a bar, *barra*. It signifieth legally a destruction forever, or taking away for a time of the action of him that right hath. And *barra* is an Italian word, and signifieth barre, as we use it; and it is called a plea in barre, when such a barre is pleaded.” Co. Litt. 372 a.

### I THEORY OF THE GENERAL ISSUE

The contrast between the cumbersome declarations of the common law and the sharp, clear declarations of modern practice has already appeared. Similar, almost identical, in material averments, the chief difference between them is in the manner of statement, rather than in the matter stated. Little wonder, then, that even ancient lawyers grow impatient at the length of their pleadings. Thus :

#### MILWARD *v.* WELDEN.

THE TRANSACTIONS OF THE HIGH COURT OF CHANCERY. 1566.

REPORTED TOTHILL'S CHANCERY REPORTS, 101.

Milward *contra* Welden, the plaintiff for putting in a long replication was fined ten pounds, and imprisoned, and a hole to be made through the replication, and hanged about his neck, and he to go from bar to bar, in 8 Eliz. li. B. fo. 678.

[B has slandered A. A, suing at the common law, brings his cumbersome action on the case for words. His declaration is necessarily long, abounding in innuendoes and colloquia. To defend

word by word, to say, "Nay" to the very words of that declaration, will be a long, hard task, and parchment, eyesight, and time are valuable to the pleader. The pleader will not defend word by word. He will use the short, simple formula which is designated as the general issue, and denominated, "Not guilty."

Under the plea of "Not guilty" he may introduce defences appropriate to the meaning of the words. He may show that he did not speak them. But if he wishes to say, "I confess that I spoke the words, but I spoke them forty years ago, and the statute of limitations bars any action against me for their speaking," he is not saying in substance, "Not guilty;" he is saying, "Guilty, but I have a defence;" and so for him the general issue will be a useless plea, and it will go hard with him if he pleads it.

We shall see that each action (covenant possibly excepted) has its general issue; that if we ask these general issues what evidence may be introduced under them, and then look at their form for answer, sometimes the answer will be true; and sometimes, because the scope of the plea has been distorted, the answer will be false.

What the several general issues are, and what evidence may be introduced under them, is to be gathered from the following pages.—ED.]

"*Et s'ils sont a issue.*" Issue, *exitus*, a single, certaine, and materiall point issuing out of the allegations or pleas of the plaintife and defendant, consisting regularly upon an affirmative and negative to be tried by twelve men. And it is twofold, a special issue, as here in the case of Littleton; or generall, as in *trespasse*, not guilty, in *assise*, *nul tort nul disseisin*, &c. And as an issue naturall commeth of two several persons, so an issue legal issueth out of two several allegations of advers parties.

"And to make our bookes more easie to be understood concerning this point, it is good to set down some necessary rules (among many other) concerning joyning of issues. An issue being taken generally referreth to the count, and not to the writ. As in an account the writ chargeth him generally to be his receiver, the count chargeth him specially to be his receiver by the hands of T.: the defendant pleadeth, that he was never his receiver in manner and forme, &c., this shall referre to the count, so as he cannot be charged but by the receipt by the hands of T.

"A special issue must be taken in one certain materiall point, which may be best understood, and best tried. . . .

"An issue joyned upon an *absque hoc*, &c., ought to have an affirmative after it. Two affirmitives shall not make an issue, unlesse it be left the issue should not be tried. . . .

“Where the issue is joined on the part of the defendant, the entry is, *et de hoc ponit se super patriam*; but if it be of the part of the plaintiff, the entry is, *et hoc petit quod inquiretur per patriam*.” Co. Litt. 126 a.

“One original exception to the above general rule, as to the formation of issues, occurs in the instance of a writ of right. The general issue to the count upon that writ is, and ever has been, formed by two affirmatives: The averment on one side being, that the demandant has greater right than the tenant; and on the other, that the tenant has greater right than the demandant — or, more precisely, the demandant ‘demands’ the tenements as his right and inheritance; and the tenant, by way of denial, prays recognition to be made, whether he himself, or the demandant, has greater right, etc. But by reason of the irregular and imperfect form of this plea, it is technically called, ‘the mise,’ as distinguished from general ‘issues,’ strictly so called.” Gould, Pleading, 304.

“The other anomalous issue, . . . before referred to, occurs in the general plea of denial, to a count in dower; which, to the extent of the interest demanded, is strictly analogous to a count upon a writ of right. The count in dower merely ‘demands the third part of — acres of land, etc., as the dower’ of the demandant, etc.; and the general issue is, that J. S. was not seised of such estate, etc.: a mode of negation that is merely argumentative.” Gould, Pleading, 305.

“These two anomalies appear to form the only original exceptions to the general rule, that every issue must consist of a direct affirmative and a direct negative. And the only reason for these exceptions would seem to be, that they are conformable to the ancient precedents.” Gould, Pleading, 305.

“Thus, if a defendant pleads that his co-tenant is dead; a replication that he is ‘alive,’ does not form a proper issue. . . . The replication should be, that the co-defendant ‘is not dead;’ or that he is alive, without this, that he is dead.” Gould, Pleading, 303.

“Pleadings which amount to the general issue are not to be allowed; but the general issue is to be entered.” Co. Litt. 303 b.

“The general issue is the extreme limit reached by modern courts in abbreviating and simplifying the ancient practice in pleading.

“The general issues now in use are the following:

“In personal actions *ex delicto* in general, whether sounding in trespass or case, and whether founded on misfeasance or nonfeasance, and including ejectment, the general issue is, ‘not guilty.’



"In replevin the general issue is *non cepit*, which puts in issue the taking, and does not authorize a judgment of *retorno habendo*; or *non detinet*, as the wrongful detention is by statute in some States the wrongful act.

"In disseisin, *nul tort nul disseisin*.

"In detinue, *non detinet*.

"In debt on a specialty, *non est factum*, which puts in issue only the execution of the deed.

"In debt on judgment or recognizance, *nul tiel record*.

"In debt on a penal statute the more appropriate general issue is *nil debet*, because it corresponds to the form of the action. But as the object of the action is to enforce a penalty for an alleged offence, it seems that not guilty may be substituted for *nil debet*.

"In covenant broken, the general issue is the same as in debt on a specialty, — *non est factum*; or at least this is the only general plea which goes in bar of the action.

" . . In assumpsit the general issue is 'non assumpsit,' or when the action is against an executor or administrator that the said E. E., deceased, '(the testator or intestate) "did not undertake or promise," etc. "Not guilty" formerly was also held to be a proper general issue in assumpsit, because the action, being entitled trespass on the case,' was deemed to partake of the nature of an action *ex delicto*. But as the action is in substance founded exclusively on contract, the last-mentioned plea is not now considered as a proper answer to it, but is still held to be aided by verdict as being only an informal issue.

"In actions of assumpsit, whatever shows that a complete satisfaction has been received by the plaintiff may be given in evidence under the general issue.

"In debt for rent on a demise, *rien en arriere* (nothing in arrear) as well as *nil debet*, is a good general issue; for the former plea, as well as the latter, directly denies that any rent is due, and is therefore a direct denial of the alleged debt.

" . . But in covenant broken for rent, in which the covenant itself is set out and the action founded upon it, *rien en arriere* is not a good plea, because it impliedly confesses both the covenant stated and the breach, and alleges nothing in avoidance of either; whereas in the preceding case of debt for rent, though reserved by deed, it is neither necessary nor usual to allege the deed, and if alleged it is but inducement, and therefore need not be directly answered in pleading. And the gist of the action of debt being the mere fact of rent in arrear, the plea of *nil debet* or *rien en arriere*, as it is a direct denial of that fact, is a proper general issue.

"On a similar principle to that which governs in covenant broken, *nil debet* is not a good plea to debt on bond, and the plea is ill on general demurrer; it being the nature of the plea, and not the manner of pleading it, that is defective." Gould, Pleading, 300 [Hamilton's ed. 1899].

## SECTION I.

### DEBT.

"Under the plea of *nil debet*, the defendant may prove at the trial, coverture when the promise was made, lunacy, duress, infancy, release, arbitrament, accord with satisfaction, payment, a want of consideration for the promise, failure or fraud in the consideration, and in short, anything which shows that there is no existing debt due. The statute of limitations, bankruptcy, and tender are believed to be the only defences which may not be proved under this plea, and they are excepted because they do not confess that the debt is owing, but insist only that no action can be maintained for it."<sup>1</sup> 4 Minor's Institutes, 641.

### WARNER *v.* WAINSFORD.

IN THE KING'S BENCH. BETWEEN 1603 AND 1625.

REPORTED HOBART, 127.

The purpose of the general issue.

"Sir Henry Warner brought an action of debt against Wainsford, administrator of Kirby, who pleaded that the intestate was indebted unto him by divers obligations (and recites them), to the sum of £80, and that goods to that value, and not above, came to his hands, which he detains for his debt, and that he had nothing *ultra*. The plaintiff demurred in law, because it amounted unto the general issue of *pleinement administer*. But the better opinion of the court was, that this is no cause of demurrer, for the plea is sufficient; and besides it is some matter in law, which hath been allowed always to be pleaded especially, and not left to a jury; and the reason for pressing a general issue is not for insufficiency of the plea, but not to make long records when there is no cause, which

<sup>1</sup> Qy. Should not set-off have been included? True, this partakes of the nature of a declaration rather than of a plea, but it is certainly a defence. — Ed.

is matter of discretion, and therefore it is to be moved to the court, and not to be demurred upon."

### MILLS ASSIGN' VIC' v. BOND.

IN THE KING'S BENCH. 1720.

REPORTED FORTESCUE, 363.

The general issue to a writ of debt on a bond is not *nil debet*.

A condition of a bond was (in an action upon a bail-bond) to appear *Die Sabbati prox' post Octab' pur'*, and the term ended on Friday, which was the day before; and this appeared in the declaration brought by the assignee of the bail bond; and the defendant pleaded *nil debet* to the bond, and the plaintiff demurs.

*Per cur'*: *Nil debet* is no plea to a bond, but writ to appear out of term is a void writ, and so is the condition of the bond; and so plaintiff has no cause of action on his own showing.

### ANONYMOUS.

IN THE COMMON PLEAS. 1753.

REPORTED 2 WILSON, 10.

Debt upon a bond, *nil debet*, and a general demurrer; and it was insisted by Sergeant Draper for the defendant, that *nil debet* to a bond was good upon a general demurrer, and was only a jeoffail and matter of form, that after a verdict it will make a final end between the parties, let the verdict be which way it will. *Sed per curiam*. It is naught upon a general demurrer, though perhaps it might have been helped after a verdict.

Judgment for the plaintiff.

### ANONYMOUS.

CORAM HOLT, C. J. AT NISI PRIUS AT HERTFORD. 1690.

REPORTED 1 SALKELD, 278.

Theory of the plea of *nil debet*.

"It was adjudged, per Holt, C. J. That in debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence, for the statute has made it no debt at the time of the plea pleaded, the words of which are in the present tense; but in case of *non*

*assumpsit*, the statute of limitations cannot be given in evidence, for it speaks of a time past, and relates to the time of making the promise."

### CHAPPLE v. DURSTON.

EXCHEQUER OF PLEAS. 1830.

REPORTED 1 CROMPTON AND JERVIS, 1.

To plead the statute of limitations is not to deny an existing debt.

This was an action of debt upon a money bond, a promissory note, and the usual money counts. The defendant pleaded, amongst other things, to the count upon the bond, a set-off, and a similar plea to the other counts; to which the plaintiff replied that he was not indebted to the defendant *modo et formâ* as in those pleas was alleged.

At the trial, before Tindal, C. J., at the Summer Assizes for the county of Somerset, 1829, it appeared that there was due to the plaintiff upon the bond, for principal and interest, the sum of £77 10s., and that the plaintiff owed the defendant £20 for rent due at Lady-day, 1822. The latter sum the defendant claimed to set off against the demand of the plaintiff; but the plaintiff contended that this debt was barred by the statute of limitations, and that he was entitled to take advantage of the statute, although he had not specially replied it. The Lord Chief Justice directed the jury to find a verdict for the plaintiff for £57 10s., and gave the plaintiff leave to move to increase that verdict, should this court be of opinion that he could take advantage of the statute under his general replication.

In pursuance of this leave, Erle, in Michaelmas Term last, obtained a rule, calling upon the defendant to show cause why the verdict should not be increased by the sum of £20; against which

Erskine showed cause. The statute of limitations does not destroy the debt, but merely bars the remedy; *Quantock v. England*, 5 Bur. 2628, S. C. Bl. 702; for if it did operate as an extinguishment of the debt, in no form of action need the statute be specially pleaded, and no promise without a fresh consideration would be sufficient to revive a debt of longer standing than six years. It is therefore a matter of law which does not go to the gist of the action, but to the discharge of it, and as such must be pleaded. B. N. P. 152. Indeed, it is admitted, that, in assumpsit, the statute of limitations must be pleaded; *Lee v. Rogers*, 1 Lev. 110;

see 1 Wms. Saund. 283, n. (2); *Duppa v. Mayo*; but a distinction, unfounded in principle, has been drawn between assumpsit and debt. Thus, in *Draper v. Glassop*, 1 Lord Raym. 153, it was said, per Holt, C. J.: "If the defendant plead *non assumpsit*, he cannot give in evidence the statute of limitations, because the assumpsit goes to the præter tense; but upon *nil debet* pleaded the statute is good evidence, because the issue is joined *per verba de præsentis*, and without doubt *nil debet* by virtue of the statute; and it is no debt at this time, though it was a debt." The same rule was adjudged in an anonymous case reported in 1 Salkeld, 278, but these cases obviously proceed upon the notion, now exploded, that the statute of limitations destroys the debt; for, if the distinction between the præter and present tense were well founded, nothing could be given in evidence, under the plea of *non assumpsit*, which occurred subsequently to the promise; whereas, not only facts to show that no such promise as that stated in the declaration was made, or that the promise was void at the time, by reason of duress, infancy, or coverture, but also facts to show that no cause of action subsisted at the commencement of the suit, as accord and satisfaction, a release, and the like occurring after the promise, may be given in evidence under that plea. Expediency requires that the statute of limitations should be pleaded in debt equally as in assumpsit. The exceptions in the statute are alike applicable to both actions, and the plaintiff is equally liable to be surprised. In either case the statute does not extinguish the debt, but only takes away the remedy; and as in either case the defendant may insist upon the statute or waive it, if he intend to insist upon the statute he should plead it, to prevent surprise. 1 Wms. Saund. 283, n. (2). Against the general application of this rule, the case of *Duppa v. Mayo*, 1 Saund. 282, does not militate. That case decided, that a plea of *nil debet infra sex annos* should conclude to the country; but that plea amounted to the general issue merely, the words *infra sex annos* being surplusage; because if the defendant owed nothing at the commencement of the suit, it was immaterial whether he had owed anything at any other period within six years, and, if he was then indebted, it mattered not how long the debt had been due. By equitable construction, the statute of limitations has been applied to a set-off, and a debt barred by the statute cannot be set off; but as the defendant waives the statute by not pleading it, so does the plaintiff if the statute be not replied. The rule of expediency is equally applicable to a replication as to a plea, and the mere change of character between the parties can afford no solid distinction. A defendant is not bound to avail him-

self of his set-off, but may bring a cross action, in which case the statute must be pleaded: why, then, if, to avoid circuity of action, the set-off be pleaded, should the defendant be placed in a worse situation than if he had sued for the amount? In a book of authority, B. N. P. 180, it is said: "A debt barred by the statute of limitations cannot be set off. If it be pleaded in bar to the action, the plaintiff may reply the statute of limitations. If it be given in evidence on a notice of set-off, it may be objected to at the trial." So, in *Remington v. Stevens*, 2 Str. 1271, it was held, that the statute of limitations may be replied to a plea of set-off. In legal construction the word "may" is here to be understood as "must;" for, if the statute be available at all against a set-off, it can only be subject to the same rules as if the set-off constituted the subject of a distinct action. This view is confirmed by the statute 9 Geo. IV. c. 14, s. 4, which places original demands and contracts alleged by way of set-off upon the same footing with respect to the statute of limitations.

*Erle, contra.* The defendant is liable to be surprised by many defences that may be given in evidence under the general issue; and, even in criminal pleading, no notice is given to the defendant, by allegations which are held to be immaterial. Expediency is not, therefore, a safe ground of decision in this case. Referring to the words of the statute, and the earlier authorities, it would seem that in no case need the statute be pleaded, the debt being destroyed when more than six years old. *Brown v. Hancock*, Cro. Car. 115. However, in the action of assumpsit it has been decided that the statute must be pleaded; but in debt there is no decision to that effect. On the contrary, although the modern practice may have been otherwise, the case of *Draper v. Glassop*, 1 Lord Raym. 153, and the anonymous case in 1 Salkeld, 278, expressly show that the statute of limitations may be given in evidence under the plea of *nil debet*. Upon this subject the opinion of Lord Holt is entitled to great consideration, sanctioned as it is by the authority of Lord Chief Baron Comyns, Com. Dig. "Plead." (2 W. 17), and the case of *Duppa v. Mayo*, 1 Saund. 282. But there is no case to show that the statute must be replied to a plea of set-off; for the authorities referred to merely show that it may be replied; which will be true, although it may also be given in evidence under a general replication of *nil debet*. Were it otherwise, the plaintiff would be in a worse situation than if he were defendant to an action for the recovery of the subject of the set-off; for a defendant may plead several pleas, whereas one matter only can be replied.

*Cur. adv. vult.*

Vaughan, B., now delivered the judgment of the court as follows:—

This was an action of debt tried before the Lord Chief Justice of the Court of Common Pleas at the last Summer Assizes for the county of Somerset.

The first count of the declaration was upon a bond, dated 4th March, 1800, and conditioned for the payment of £150, with interest; the second count was upon a promissory note, and there were also added the common money counts.

The defendant pleaded to the first count on the bond, *non est factum, solvit post diem, solvit post diem* by the executors of the co-obligor, and a set-off; and, to the other counts, *nil debet*, the statute of limitations, and a set-off. Issues were joined on these several pleas; and to the pleas of set-off, the common replication was filed, that the plaintiff was not indebted modo et forma as in those pleas was alleged, concluding to the country.

Upon the trial of the cause, it was admitted by the defendant, that £50 remained due upon the bond, together with interest thereon, from the year 1800, amounting to £77 10s. The defendant proved that the plaintiff was indebted to him in the sum of £20, for rent, which became due at Lady-day, 1822, for certain premises occupied by the plaintiff under the defendant, and which he insisted ought to be deducted from the £77 10s. admitted to be due from him to the plaintiff upon the bond. The plaintiff, on the other hand, contended that, more than six years having elapsed since that debt accrued, the defendant's remedy for the recovery of it was barred by the statute of limitations, and that he was entitled to the benefit of that statute, under the common form of replication to the plea of set-off, without replying the statute of limitations specially.

The Lord Chief Justice of the Common Pleas seems to have been of opinion, that, as the plaintiff had not replied the statute of limitations to the plea of set-off, the defendant was entitled to set off this sum of £20, although it was a debt which had accrued more than six years before the plea pleaded, and therefore directed the jury to find their verdict for the plaintiff for £57 10s. only, reserving to the plaintiff the liberty to move to increase the verdict to the sum of £77 10s., if this court should be of opinion that he was entitled to the larger sum.

The question, therefore, reserved for the opinion of the court upon this state of facts is, whether, to a plea of set-off, pleaded in an action of debt, the plaintiff is bound to reply the statute of limitations, or whether he may avail himself of the benefit of that statute, upon the

common replication that he was not indebted *modo et formâ*, concluding to the country.

The case was ably argued by Mr. Erle for the plaintiff, and Mr. Erskine for the defendant, and many authorities were cited, which we have thought it our duty to examine; and which, after due consideration, have induced us to conclude, that the view taken of the question by the Lord Chief Justice of the Common Pleas, upon the trial of the cause, was the correct one: viz. that the plaintiff, having omitted to reply the statute of limitations to the plea of set-off, was precluded from availing himself of that statute as a bar to the defendant's cross-demand.

There are few acts of parliament which have generated more controversy, and been productive of more litigation, than the statute 21 Jac. 1, c. 16, which was passed (as the preamble of it declares) for the purpose of quieting men's estates, and for the avoiding of suits.

The multiplicity of cases and the many contradictory decisions to be found in our Common Law Reports upon the construction of this statute afford the strongest evidence of the inconvenience and mischief occasioned by a departure from the plain and literal sense of the act, and from too much refinement in construing its provisions. The third section enacts, that the different personal actions therein enumerated, shall be brought within the respective periods of time limited by that section, and not after. And in *Brown v. Hancock*, one of the earliest cases which occurred after the passing of the act, in the fourth year of the reign of Charles the 1st, and which is reported in Cro. Car. 115, the Court of Common Pleas held, that, if it appeared by the plaintiff's own showing that the action was not brought within the limited time, or if the contract, whether in assumpsit or debt, were alleged to be within the time, and, upon *nil debet* or *non assumpsit* pleaded, it appeared in evidence that the assumpsit or contract was beyond the time, the action lies not, and the defendant shall take advantage thereof, if it be specially found by the jury; for the statute is in the negative, that he shall not maintain such action after the period limited by the statute had expired. But this decision was not long acted upon, for, in the following year, the Judges of the Court of King's Bench determined, upon error from the Common Pleas, in *Thursley v. Warren*, Cro. Car. 160, that the statute of Limitations must be pleaded, although the declaration alleged both the promise and the breach of it to have been made more than six years before the commencement of the suit. The same point was determined in *Still v. Finch*, Cro. Car. 281; *Hopkins v. Bitthead*, Cro. Car. 404; *Lee v. Rogers*, 1 Lev.



110, and in *Gould v. Johnson*, Lord Raym. 838, which latter case came also by writ of error from the Court of Common Pleas. One of the errors assigned in that case was, that it appeared upon the declaration that the cause of action accrued more than six years before, and therefore it was not necessary to plead the statute. But the court determined that the statute must be pleaded, that the plaintiff might have the opportunity of replying to such matter, for it may be that the original was sued within six years after the cause of action accrued.

A distinction seems to have been taken as to the form of pleading in assumpsit and debt, the authorities agreeing that, in assumpsit, the defendant must plead the statute, and conclude his plea with a verification, to give the plaintiff an opportunity of answering it, whereas in debt the defendant may give the statute in evidence under *nil debet* generally. The reason assigned by Lord Holt for this distinction is, that in debt upon *nil debet* pleaded the statute of limitations may be given in evidence, because it has made it no debt at the time of the plea pleaded, the words of which are in the present tense: but, in assumpsit, the statute of limitations cannot be given in evidence, for it speaks of a time past, and relates to the time of making the promise. *Draper v. Glassop*, 1 Lord Raym. 153, Anon. cor. Holt, C. J., at Hertford, 1690. 1 Salk. 278.

This rule, originating, as it should seem, in this decision of Lord Holt, has been incorporated into the admirable Digest of Lord Chief Baron Comyns, "Pleader" (2 W. 17), where, in enumerating the cases in which the defendant may plead the general issue *nil debet*, to debt upon contract, not upon bond, he says, "so, though the debt is barred by the statute of limitations, for he could not plead *nil debet infra sex annos*, but *nil debet* generally," and cites the case of *Draper v. Glassop*. It appears to us that this distinction savors more of ingenious refinement than of plain and practical good sense, and we conceive that the same rule would now be extended as well to actions of debt as of assumpsit, the same reasons for pleading the statute applying equally to both. If the statute is not pleaded, the plaintiff is liable to be surprised, and therefore equally unprepared to answer in the one action as in the other. In neither case does the statute extinguish the debt, but bars only the remedy, and it is optional whether the defendant will insist upon the statute or waive it. If he intends to insist upon it, he should plead it, to prevent surprise, and if he does not, it should be presumed he intends to waive it. This is the view taken by the late Mr. Serjt. Williams, than whom a sounder lawyer, or more accurate special pleader, has rarely done honor to his profession;

and he states it to be very usual, and the modern practice, to plead to debt on simple contract, that the cause of action did not accrue within six years, that the plaintiff may reply, either that he was within any of the exceptions in the statute or that he has sued out a writ within time, as is the common case in assumpsit.

Assuming, therefore, that there is no solid foundation for any distinction in the mode of pleading the statute of limitations, whether in debt or in assumpsit, the simple point to be considered is, whether, where a set-off is pleaded, the plaintiff, in order to avail himself of the statute, must reply it specially. It may be said, that this would impose a great hardship on the plaintiff, for as he cannot reply more than one matter, he would be placed in a worse situation than the defendant, who can plead the statute, and also under the statute of Ann., insist upon any other defence. Indeed, it has been suggested by Mr. Starkie, in his valuable practical treatise on the law of evidence, that it would be unreasonable that, in one and the same action, the defendant should be indulged in making several distinct answers to the plaintiff's claim, and yet that the plaintiff, in his answer to a counter claim, on the part of the defendant, should be confined to one only. 3 Starkie, 1318.

We have not been able to find any authority directly upon this point. In Buller's Nisi Prius, 180, it is said, that if a debt, barred by the statute of limitations, be pleaded, the plaintiff may reply the statute. If it be given in evidence on notice, it may be objected to at the trial. This *dictum* of Mr. Justice Buller seems to have been founded upon the authority of a very short and loose note of the case of Remington v. Stevens, 2 Stra. 1271, where it is reported to have been ruled, that the statute of limitations may be replied to a plea of set-off; but, in legal construction, we interpret the expression "may" imperatively, to mean "must."

**A plea of set-off** has ever been considered as in the nature of a cross-declaration; and, as it is clear, that if the defendant had sought to enforce his demand by assuming the character of plaintiff, the adverse party could have protected himself solely by pleading the statute; so, we conceive, that the mere difference of the position of the names and characters of the parties upon the record, will not dispense with the necessity of introducing, by way of replication, the same substantive matter of defence to the counter demand. Nor can the hardship of this course of proceeding be with justice complained of, when it is remembered, that the plaintiff is at liberty to reply *nil debet* as to part of the defendant's cross-demand, and the statute of limitations to the residue. Upon the whole, it seems to us more consonant to the acknowledged rules of

pleading to determine that the statute of limitations ought, in this instance, to have been replied, and that, the plaintiff having omitted to do so, the verdict must stand, and the rule be discharged.<sup>1</sup> Rule discharged.<sup>2</sup>

## ACTIONS ON SPECIALTIES.

"In covenant there is, properly speaking, no general issue; for though the defendant may plead non est factum, as in debt on specialty, yet that only puts the deed in issue, and not the breach of covenant: and *non infregit conventionem* is a bad plea. In this action, therefore, the defendant must specially controvert the deed, or show that he has performed the covenant, or is legally excused from the performance of it; or admitting the breach, that he is discharged by matter *ex post facto*, as a release, etc." Tidd's Practice, 593.

### EDWARDS v. BROWN, HARRIES, AND STEPHENS.

EXCHEQUER OF PLEAS. 1831.

REPORTED 1 CROMPTON AND JERVIS, 307.

A denial of one's ignorance of the legal effect of a bond is not a denial of the making of the bond.

Debt upon a bond dated 12th October, 1826. The defendant, Brown, suffered judgment by default. The bond, as set out on *oyer*, appeared to be a bond given upon a mortgage for £1800 to the plaintiff. It recited that Brown was seised in tail of the mortgaged premises; that, by lease and release, of even date, the premises had been conveyed to make a tenant to the *præcipe*, that a recovery might be suffered; and the condition was, that if the recovery should be suffered in manner and form mentioned in the release, and so and in such manner as that under and by virtue of the recovery and of the release, the premises should be vested in the plaintiff in fee, according to the true intent and meaning of the release, the bond should be void. The defendant, Harries, then pleaded, first, *non est factum*; secondly, that the recovery was

<sup>1</sup> Garrow, B., who was absent on account of indisposition, concurred in the judgment of the court. The Lord Chief Baron was sitting in equity.

<sup>2</sup> 6 Bac. Abr., Lim. Ac 405; 3 Dane's Abr., Ev., 464; Viner, Abr., Lim. 121; Com. Dig. Pl. 2 W. 16; Gilb. H. C. P. 66; Lee v. Clark, 2 East, 333 [1802]; Draper v. Glassop, 1 Ld. Ray. 153; Anon. 1 Salk. 278 [both 1690]; Brown v. Hancock, Hetley, 111, s. c. Cro. Car. 115 [1628]; Petrie v. White, 3 T. R. 5 at 11 [1789] *contra*; Woodhouse v. Williams, York Sum. Ass. 1829; Pearsall v. Dwight, 2 Mass. 87 [1805]; 1 Wms. Saunders, 283 a, note, acc. — ED.

suffered *modo et formâ*, etc.; and that, under and by virtue of the recovery, and of the lease and release, the premises became vested in the plaintiff in fee, according to the true intent and meaning of the release; thirdly, that a recovery was suffered, and that if Brown had been seised in tail, the premises would have vested in the plaintiff in fee;<sup>1</sup> and fourthly, that the recovery mentioned in the release was suffered. Stephens also pleaded *non est factum*, and a plea similar to the second plea of Harries. The plaintiff replied to the second pleas of Harries and Stephens, that the recovery was not suffered so and in such manner as that, under and by virtue thereof, and of the lease and release, the premises became vested in the plaintiff in fee, according to the true intent and meaning of the release; and to the fourth plea, pleaded by Harries, that the recovery was not suffered so and in such manner as that, under and by virtue thereof, and of the lease and release, the premises became vested in the plaintiff in fee according to the true intent and meaning of the release. Issues were joined on the pleas of *non est factum*; on the replications to the second and fourth pleas of Harries, on the replication to the second plea of Stephens, and on the replication to the third plea of Harries, upon which no question arose.<sup>2</sup>

At the trial, before Park, J., at the last Summer Assizes for the county of Hereford, it appeared, that Brown was seised of the premises in question for life only,<sup>3</sup> and not in tail: so that, although the recovery was duly suffered, it could not vest in the plaintiff a fee. Russell, Serjt., tendered evidence to prove that Stephens had been induced by fraud to execute the bond, but the learned judge was of opinion, that such evidence was not admissible under the plea of *non est factum*. The jury found a verdict for the plaintiff.

In Michaelmas Term last, Russell, Serjt., for Stephens, obtained a rule to show cause why a new trial should not be had, upon the ground of the rejection of the evidence of fraud; and E. V. Williams obtained a rule *nisi* to enter a verdict for the defendant Harries, upon the second and fourth pleas, upon the ground that the recovery was suffered according to the true intent and meaning of the condition and release.

<sup>1</sup> See this plea, 3 Y. & J. 424.

<sup>2</sup> The validity of the third plea was before discussed and determined. See 3 Y. & J. 424.

<sup>3</sup> Williams obtained a rule *nisi* for a new trial, upon the ground that the evidence did not show that Brown was only seised for life of the premises; but as this question turned upon the effect of the evidence merely, the arguments and the judgment upon this point are omitted.

John Evans and Godson showed cause. Fraud is not admissible under the general issue. It is laid down in Chitty on Pleading, Vol. I. pp. 424, 425, and in Tidd's Practice, Vol. I. p. 650, that fraud is admissible under the plea of *non est factum*, upon the authority of the case of Lambert v. Atkins, 2 Camp. 272; but that, which was a case of coverture, does not bear out that position. It may be admitted that fraud avoids all contracts; but it does not, therefore, follow, that fraud may be given in evidence under this plea. In Harmer v. Wright, 2 Stark. 35, it was decided, that the defendant could not, on the plea of *non est factum*, prove that the bond was void at common law, as being an illegal contract to forego prosecutions for felonies. The correct rule appears to be, that nothing that affects the consideration or inducement to execute the bond can be given in evidence under the plea of *non est factum*.<sup>1</sup> Whelpdale's Case, 5 Rep. 119 a, is no authority for the defendant; and the second and third resolutions show that where a deed is voidable, as by duress, or is void by reason of an act of Parliament, the matter must be pleaded specially. In the note to this case by Fraser, the rule is stated to be, that whatever tends to show an invalid or defective execution of a deed at the time of plea pleaded, may be given in evidence under the plea of *non est factum*; but whatever impeaches the deed by reason of the matter or consideration thereof, whether such matter or consideration renders the deed void by the policy of the common law, or by the express provisions of the statute law, must be specially pleaded, and such plea ought to conclude with "and so the said deed is void," and not with "*et sic non est factum*." Here the evidence was not tendered to affect the execution of the bond, but to impeach the consideration or inducement to execute it; and therefore this defence should have been pleaded specially, and could not be admitted under the plea of *non est factum*.

The point, as to the effect of the recovery, was decided by the court upon the former argument, and the authorities are collected in the report of that argument. 3 Y. & J. 423.

Russell, Serjt., for the defendant Stephens. This defence of Stephens was receivable under the plea of *non est factum*. He was induced to execute by the misrepresentation of the plaintiff. The contract was concocted in fraud, and, being fraudulent, it never could have been his deed. The rule is, that where originally, or at the time of plea pleaded, it is not the deed of the party, it may be given in evidence under *non est factum*; and in no case, except in

<sup>1</sup> See the cases collected by Roscoe, on Evidence, 244.

that of forgery, can it be less the deed of the party than when it is obtained by fraud, for fraud vitiates all transactions. *Fermer's Case*, 3 Rep. 77 a. In the modern publications on pleading, though a form is given of a plea of fraud, concluding "and therefore the bond is void," yet it is said, that fraud may be given in evidence under the general issue.

[Bayley, B. Can you distinguish this from a case of duress?]

In the second resolution in *Whelpdale's Case*, duress is classed amongst those cases in which the deed is voidable merely. The note by Mr. Fraser to that case is in favour of the defendant; he states, that what tends to show an invalid or defective execution, may be given in evidence under *non est factum*. The present case falls within that rule. He then adds, that what impeaches the deed by the matter or consideration thereof must be specially pleaded. Here it is not attempted to impeach the matter or consideration of the bond, but the evidence was offered to show that the party was induced to execute by fraud. If unlettered and misread is evidence under *non est factum*, as to which there can be no doubt (see *Com. Dig. Fait* (B. 2), Reading), misrepresentation of the effect of the instrument must likewise be admissible under that plea. In *Thompson v. Rock*, 4 M. & S. 338, it was held, that, upon a plea of *non est factum* to a sheriff's bond, the defendant might show, at the trial, that the bond was dated and executed on a day subsequent to the return of the writ.<sup>1</sup>

E. V. Williams, for Harries. Looking at the bond and the release, the intention of the parties was merely that a recovery should be suffered. The bond was executed upon an assumption that the circumstances recited were true; and if the recitals had been true, the recovery would have vested a fee in the plaintiff. The object of the recitals is to prevent a discussion as to the existing state of things, and to show upon what terms the obligation was entered into. In the argument upon the former occasion, an authority was cited, to show that recitals cannot operate as an estoppel, *Br. Faits*, p. 4; 18 Ves. 181, and so it is laid down in *Co. Litt.* 352; but all the subsequent authorities are clearly the other way. The cases upon this subject were brought under consideration in *Kelly v. Wright*, Willes, 12, and there the older authorities were overruled. The doctrine now is, that the intention of the parties is to be collected from the recitals as well as from the other parts of the deed. This

<sup>1</sup> The authority of this case is questioned by Mr. Fraser in his learned note to *Whelpdale's Case*, 5 Rep. 244.

was established in *Lord Arlington v. Merricke*, 2 Saund. 414, and has been uniformly acted upon in a long series of decisions.<sup>1</sup>

*Cur. adv. vult.*

Bayley, B., now delivered the judgment of the court, and, after stating the pleadings as above, proceeded thus: At the time of the trial, the defendant, Stephens, offered to prove that he was drawn in by fraud to execute the bond; but the learned judge being of opinion that fraud could not be given in evidence upon *non est factum*, that evidence was rejected; and it is upon the ground that such rejection was improper that my brother Russell obtained his rule *nisi* for a new trial.

I agree with my brother Russell, that, whatever shows that the bond never was the deed of the defendant may be given in evidence upon *non est factum*. But if the party actually executes it, and was competent at the time to execute it, and was not deceived as to the actual contents of the bond, though he might be misled as to the legal effect, and though he might have been entitled to avoid the bond by stating that he was so misled, it nevertheless became, by the execution, the deed of the defendant, and he is not at liberty, upon the plea of *non est factum*, to say it was not.

The rule, as laid down in Gilbert's Evidence, 162, is this: "The only point in issue, and the controversy, on *non est factum*, is, whether the deed declared on be the act of the party, so that when the act is proved to be done, the whole matter denied by the defendant is proved to the jury; but if there be any other circumstances to destroy that act, and avoid its binding force, that must be shown to the court, that the court may judge, and not the jury, whether they are sufficient to avoid that deed." And we accordingly meet with many instances in which what would avoid the deed and destroy its binding force, both at common law and by statute, has been held inadmissible in evidence upon *non est factum*, and other instances in which it has been specially pleaded.

In *Whelpdale's Case*, 5 Rep. 119, the third resolution is — "Where a bond or other writing is by act of Parliament enacted to be void, the party who is bound cannot plead *non est factum*; but, in construction of law, the deed is to be avoided by the party who is bound by it, by pleading the special matter, taking advantage of the special matter; for although the act makes the bond or other writing void, yet thereto the law doth tacitly require order and manner, which the obligor ought to follow."

<sup>1</sup> See the cases collected 2 Saund. last ed. 414, n. (5), n. b, c; and see *Parker v. Wise*, 6 M. & S. 239.

In *Colton v. Goodridge*, Bl. 1108, the defendant was not allowed, upon *non est factum*, to refer to the condition of the bond, to show that it was in restraint of marriage, and therefore void at common law.

So, in *Harmer v. Rowse*, 6 M. & S. 146, the defendant was not allowed to prove, on *non est factum* to a bond, that it was given to stifle a prosecution for felony, and therefore void at common law.

In *Thompson v. Harvey*, 1 Show. 2, where the objection to a bond was, that it was in restraint of trade, which is a common-law objection, it was pleaded specially; and in *Collins v. Blantern*, 2 Wils. 341, where the defence to an action on a bond was, that it was given to suppress a prosecution for perjury, it was pleaded specially; and in this, and the case of *Thompson v. Harvey*, the conclusion of the plea was not *et sic non est factum*, but, and so the bond was void in law.

But the authorities which come closest to this case, and press most strongly on my mind, are the cases of duress and threats. Every argument which can apply to a case where fraud is the defence, apply equally where threats or duress are the defence. The party is equally deprived of his free agency and uncontrolled judgment in either case. And yet, where duress or threats are the defence, there is authority upon authority that they cannot be given in evidence upon *non est factum*, but must be pleaded specially. The rule I have mentioned from *Gilbert's Evidence*, 162, is given as the reason why a man cannot give duress in evidence under *non est factum*.

In 1 Hen. VII. 15 b, Keble lays it down, if a man confess an obligation to be his deed, he shall not conclude *non est factum*, as if he pleaded infancy; the same law is where he pleads that he made the obligation of duress by imprisonment.

So, 14 Hen. VIII. 28 a, if a deed be made by duress of imprisonment, the defendant ought to conclude to the action, for it would be a false conclusion to say, *et sic non est factum*, for it was his deed.

Again, Plowden, 66, if an infant or a man by duress make an obligation, they shall demand judgment *si actio*, because the delivery of the deed was not void.

So, *Doctrina Placitandi*, 259, if a feme covert make an obligation, she may plead *non est factum*; but otherwise it is in case of an infant or of duress, for then it is only voidable; and, therefore, the parties cannot plead *non est factum*, but they shall say judgment *si actio*.

The second resolution in *Whelpdale's Case* is to the same effect;



and upon these authorities our opinion is, that the plea of *non est factum* in this case did not entitle the defendant to give the evidence he offered; and, consequently, that such evidence was rightly rejected.

This brings us to Mr. Williams's objection, which is, that, by the recovery which was suffered, the fee did vest in the plaintiff according to the true intent and meaning of the release. This objection rests wholly upon the expression, according to the true intent and meaning of the release; and it is founded upon this, that, according to the true intent and meaning of the release, and the right construction to be put upon it, it was sufficient if a recovery was suffered; but that it was not essential it should give the plaintiff a fee.

The first answer to this objection is, that it makes the construction of the release parcel of the issue to be tried by the jury, putting to them to decide, not a question of fact, but a matter of law; and the next, that it gives these words in the issue a meaning they could not have been intended to bear. If, according to the true construction of the issue, they are inserted to qualify the issue, and to make it mean not that the recovery vested a fee in the plaintiff *simpliciter*, but that it vested a fee in him as far as a recovery by Brown could vest one, Mr. Williams's objection would be valid; but if these words meant no more than to signify that it was the intention of the release that the plaintiff should have a perfect and effectual fee, the objection fails, and the plaintiff is entitled to have this rule discharged. And I have no doubt but that the latter is the meaning.

The defendants all represent, by the recital in the condition of the bond, that Brown is seised in tail. The plaintiff takes the estate, not for enjoyment, but as a security for money, and not for money of his own, but for trust money. When, therefore, he takes a covenant for a recovery (which, if the recital were true, would give him a fee), he does wisely to take a covenant, not merely that a recovery shall be suffered, but that it shall be suffered so as to have the effect of giving him the fee, it being clearly and unequivocally the intention of that security that he should have the fee. What is the species of contract for title that a mortgagee is naturally to be expected to take? Not one that is qualified according to the title of the mortgagor, but one that is absolute; and, as the condition of this bond shows that the money which the bond secures was lent to Brown by way of mortgage, this was the species of contract the defendants were naturally to expect.

We are therefore of opinion that both the rules in this case ought to be discharged.

Rules discharged.

## WHELPDALE'S CASE.

IN THE KING'S BENCH. 1604.

REPORTED 5 COKE, 241.

For the words *non est factum* indicate a denial that the deed is the defendant's.

In debt by Whelpdale against Whelpdale, which began Hil. 45 Eliz. Rot. 1303. The plaintiff declared on a bill obligatory made by the defendant to the plaintiff; the defendant pleaded *non est factum*, and the jury found that the bill was a joint bill made by the defendant and another to the plaintiff; and if on the matter the bill mentioned in the declaration be the deed of the defendant, the jurors prayed the advice of the court. And it was adjudged that the plaintiff should recover. And in this case four points were resolved:

1. When two men are jointly bound in a bond, although neither of them is bound by himself, yet neither of them can say, that the bond is not his deed, for he has sealed and delivered it, and each of them is bound in the whole. And therefore if they are both sued and one appears, and the other makes default, and by process of law is outlawed, he who appears shall be charged with the whole, as appears in 40 Edw. III. 36., 41 Edw. III. 3. But in the case at bar, he might have pleaded in abatement of the writ, but cannot plead *non est factum*.

2. It was resolved, that in all cases when the deed is voidable, and so remains at the time of the pleading (as if an infant seals and delivers a deed, or a man of full age by duress), in these and the like cases, the obligor cannot plead *non est factum*, for it is his deed at the time of the action brought, and ought to be avoided by special pleading, with conclusion of judgment, *si actio*, 1 Hen. VII. 15. a, b.

3. When a bond or other writing is by an act of Parliament enacted to be void, the party to be bound cannot plead *non est factum*, but in construction of law the deed is to be avoided by the party who is bound by it, by pleading the special matter, taking advantage of the act of Parliament; for although the act makes the bond or other writing void, yet thereto the law doth tacitly require order and manner, which the obligor ought to follow: as if a bond be made to a sheriff against the statute of 23 Hen. VI. cap. 10, or to any one against the stat. 13 Eliz. cap. 8, of usury, in these and other like cases the obligor ought to plead the special matter, with conclusion

of judgment, if action; and not to plead *non est factum*; and there-with agrees 7 Edw. IV. 5, 6, 7 Edw. VI. Br. *non est factum* 14, against the opinion of Montague, Plow. Comm. in Dive and Manningham's Case.

In all cases where the bond was once his deed, and afterward before the action brought becomes no deed, either by rasure, or addition, or alteration of the deed, or breaking off the seal; in this case, although it was once a deed, yet the defendant may safely plead *non est factum*, for without question at the time of the plea, which is in the present tense, it was not his deed, 36 Hen. VIII. Dyer, 59. In an action of debt on a bond against Haywood, the defendant pleaded *non est factum*, and before the day of appearance of the inquest, rats did eat the label by which the seal was fixed,<sup>1</sup> by the negligence of the clerk in whose custody it was, the justices charged the jury, that if they should find that it was the deed of the defendant at the time of the plea pleaded, that they should give a special verdict, and so they did.

### YATES v. BOEN.

IN THE KING'S BENCH. 1738.

REPORTED 2 STRANGE, 1104.

In debt upon articles, the defendant pleaded *non est factum*, and upon the trial offered to give lunacy in evidence. The Chief Justice at first thought it ought not to be admitted, upon the rule in Beverly's Case, 4 Co. 123 b, that a man shall not stultify himself; but on the authority of *Smith v. Carr*, 5 July, 1728, where Chief Baron Pengelly in the like case admitted it, and on considering the case of *Thompson v. Leech*, in 2 Vent. 198, the Chief Justice suffered it to be given in evidence. And the plaintiff upon the evidence became nonsuit.

### ABNER KELLOGG v. DEODAT INGERSOLL.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1806.

REPORTED 1 MASSACHUSETTS, 5.

And the verdict is in accord with the literal meaning of the plea.

The declaration stated that the defendant, by his deed, bearing date April 7, 1787, in consideration of £100 paid him by the plain-

<sup>1</sup> Such an accident would not now be held to vacate a deed. *Pigott's Case*, 11 Co. 26 b.

tiff, conveyed to him in fee simple a certain tract of land lying in A., and in the same deed covenanted that the premises were free and clear of all encumbrances, etc. Breach alleged, that the premises were not free, etc., of encumbrance, because, at the time of making and executing the deed, there was, ever since has been, and yet is, a public road, or town-way, six rods wide, running through the same, containing two acres and one-quarter of an acre.

To this declaration, the defendant pleaded *non est factum*, reserving a right to give any special matter in evidence. The plaintiff, consenting to the reservation, joined the issue.

The court (Strong, Sedgwick, Sewall, and Thatcher, Justices) inquired of the defendant's counsel what special matter was intended to be given in evidence under this issue; and on being informed that the existence of the way was not denied, but that the reservation in the plea was for the purpose of proving to the jury that the road was a privilege — a benefit — and not an encumbrance; they directed the pleadings to be set aside — saying it would be absurd to try, under this issue, whether the road be an encumbrance or not — that being a mere question of law, and would come properly before the court upon a demurrer to the declaration. Suppose the trial were to proceed under this issue, and the court should be of opinion that the road is not an encumbrance, then they must direct the jury to find for the defendant. What? That the deed declared on is or is not the defendant's deed.

Ives and Dewey, for the plaintiff. Bidwell, for the defendant.

*not very important*

#### ANONYMOUS.

IN THE KING'S BENCH. 1701,

REPORTED HOLT, 560.

This was a case relating to pleading a deed, and giving it in evidence, at common law and by statute, wherein a difference was made.

Holt, C. J. If a statute makes writing necessary to a common-law matter, where it was not required by the common law, the party need not plead the thing to be in writing, but give it in evidence; though if a thing is originally made by act of Parliament, which requires it to be in writing, you must plead it with all the circumstances required by the act. And therefore upon the statute Hen. VIII. of wills, a will must be pleaded to be in writing; but a collateral promise, required to be put in writing, by the statute Car. II. is well enough, if you prove it to be so in evidence, without pleading it to be in writing.

[If] A man pleads over, he shall never after take advantage of any slip or mistake in the pleading of the other side, which he could not do on a general demurrer.

## SECTION II.

## ASSUMPSIT.

“In assumpsit, the general issue is proper where there was either no contract between the parties, or not such a contract as the plaintiff has declared on. And the defendant may give in evidence under it, that the contract was void in law, by coverture, gaming, usury, etc., or voidable by infancy, duress, etc.; or if good in point of law, that it was performed by payment or otherwise, or if unperformed, that there was some legal excuse for the nonperformance of it, as a release or discharge before breach, or nonperformance by the plaintiff of a condition precedent, etc. This sort of evidence will show that the plaintiff had no cause of action. But if he had, the defendant may give in evidence, under the general issue, that it was discharged, by an accord and satisfaction, arbitrament, account stated, release, foreign attachment, or former recovery for the same cause, etc. In short, the question in assumpsit, upon the general issue, is, whether there was a subsisting debt, or cause of action, at the time of commencing the suit. But matters of law, in avoidance of the contract, or discharge of the action, are usually pleaded. And it is necessary to plead a tender, or the statute of limitations, etc., and to plead or give a notice of set-off.” Tidd, Practice, 593.

PARAMOUR *v.* JOHNSON.

IN THE KING'S BENCH. 1701.

REPORTED 12 MODERN, 376 [S. C. 1 LD. RAYM. 566].

Theory of *non assumpsit*.

Assumpsit upon several promises; plea, that the defendant paid such a sum, in satisfaction of all promises, till such a time, which the plaintiff received in satisfaction; *absque hoc*, that he made any promise since.

The plaintiff demurred, for that the plea amounted to the general issue.

Holt, Chief Justice. It is no true rule, that where defendant may

plead the general issue and give the special matter in evidence, he shall not plead specially. Wherever you may plead matter of law which avoids the cause of action, you may plead generally, and give that matter in evidence; or you may plead it specially, and upon all general issues you may give special matter in evidence. If you give color, you may plead it specially; as in debt for rent, you may plead *nil debet*, and give release in evidence. *Vide* Lyfield's Case, 10 Co. 38, where in trespass for goods the defendant confesses the taking, but says he bought them in market overt.

But it is indulgence to give accord with satisfaction in evidence upon *non assumpsit* pleaded; but that has crept in, and now is settled.

But here it appearing that the sums paid were less than those declared upon, the plaintiff had judgment; the court holding, if it had been a collateral satisfaction, the plea had been good.

### BROWN v. CORNISH.

IN THE KING'S BENCH. 1697.

REPORTED 1 LORD RAYMOND, 217.

*Indebitatus assumpsit*. The defendant pleads payment according to the promises, etc. The plaintiff demurs specially; 1, because the plea as he conceived, amounted to the general issue. *Sed non allocatur*. For per Holt, Chief Justice, it is generally true, that no plea which admits that there was once a cause of action, amounts to the general issue.

### HACKSHAW v. CLERKE.

IN THE KING'S BENCH. 1696.

REPORTED 5 MODERN, 314.

An action on the case was brought upon a bill of exchange, to which the defendant pleaded, that, after the acceptance of the bill, he gave a bond in discharge thereof,

Upon demurrer to this plea, it was objected, that it amounted to the general issue; for the debt upon the bill being extinguished by the bond, the defendant ought to have pleaded *non assumpsit*, and to have given the bond in evidence.

And the court seemed of that opinion. But by consent, the defendant pleaded the general issue.

FITS AND ANOTHER *v.* FREESTONE.

IN THE COMMON PLEAS. 1676.

REPORTED 1 MODERN, 210.

In an action grounded upon a promise in law, payment before the action brought is allowed to be given in evidence upon *non assumpsit*. But where the action is grounded upon a special promise, there payment, or any other legal discharge, must be pleaded.

BUCKNALL *v.* SWINNOCK.

IN THE KING'S BENCH. 1669.

REPORTED 1 MODERN, 7.

*Indebitatus assumpsit* for money received to the plaintiff's use. The defendant pleads specially, that *post assumptionem prædict.* there was an agreement between the plaintiff and defendant, that the defendant should pay the money to J. S., and he did pay it accordingly. The plaintiff demurs.

Jones. This plea doth not only amount to the general issue, but is repugnant in itself. It was put off to be argued.

Note. Judgment was given for the plaintiff.

DRAPER *v.* GLASSOP.

IN THE KING'S BENCH. 1690.

REPORTED 1 LORD RAYMOND, 153.

Per Holt, Chief Justice, if the defendant pleads *non assumpsit*, he cannot give in evidence the statute of limitations, because the *assumpsit* goes to the *præter-tense* ; but upon *nil debet* pleaded, the statute is good evidence, because the issue is joined *per verba de præsentis*, and without doubt *nil debet* by virtue of the statute ; and it is no debt at this time, though it was a debt.<sup>1</sup>

<sup>1</sup> "The precise day on which a material fact alleged in the pleadings took place is in most cases immaterial, except when the date of a record, or other writing, or some other fact, the time of which must be proved by a written document, is alleged." Gould, PL. 88. The plaintiff need not in the first instance show himself not barred by the statute of limitations, though the rule is otherwise in real actions ; but when the statute is pleaded, he must in his replication aver a date within the statute. It is a rule of pleading that some time should be declared upon ; but since the averment is in the first instance immaterial, the allegation of the later date is no departure. 1 Lev. 110 ; 1 Salk. 222 ; 1 Stra. 21 ; Jackson, R. Ac. 241.

*Not Common Law Rule*

JOHN PRICE *v.* HENRY P. WEAVER.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1859.

REPORTED 13 GRAY, 273.

The statute of frauds must be pleaded.

Action of contract. "And the plaintiff says that one William Field owed him the sum of sixteen dollars for services rendered and labor performed by the plaintiff for said Field, and that the plaintiff was about to sue said Field therefor, and that the defendant, in consideration that the plaintiff would forbear to sue the said Field, promised and agreed to pay the same to the plaintiff, and the defendant did forbear to sue the said Field, and the defendant owes him the said sum."

The defendant demurred to the declaration, and assigned this cause for demurrer: "That the defendant's promise was void, as within the statute of frauds, it being to answer for the debt or default of another, and no agreement in writing or memorandum thereof was ever made or signed by the defendant, nor is any copy of any agreement set out by the plaintiff in his declaration."

A. Potter, for the defendant. . . . It appearing on the face of the papers that the promise is within the statute, it may be taken advantage of by demurrer. *Walker v. Locke*, 5 Cush. 90; *Tomlinson v. Gell*, 6 Ad. & El. 564; *Jones v. Ashburnham*, 4 East, 455; *Read v. Nash*, 1 Wils. 305.

No counsel appeared for the plaintiff.

Metcalf, J. As this demurrer contains a traverse, or denial of facts, it is wrong in form. But we do not overrule it for that reason. We treat it, as the counsel for the defendant treated it, namely, as a demurrer, because the declaration, though it sets forth an agreement which is within the statute of frauds, does not allege that the agreement was in writing. This, however, is not a legal cause for demurrer. The statute of frauds has not altered the rules of pleading in law or equity. A declaration on a promise which, though oral only, was valid by the common law, may be declared on in the same manner, since the statute, as it might have been before. The writing is matter of proof, and not of allegation. 1 Saund. 276, note (2); Steph. Pl. 1st Amer. ed. 376; Browne on St. of Frauds, s. 505. And this rule of pleading is not changed by the Practice Act of 1852. We must, therefore, overrule the demurrer. If the defendant shall hereafter rightly answer and go



to trial, he will prevail, unless the plaintiff shall prove that the agreement declared on was in writing, and was signed as the statute of frauds (Rev. Sts. c. 74, s. 1) requires.

Demurrer overruled.

**MULRY v. MOHAWK VALLEY INSURANCE COMPANY.**

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1856.

REPORTED 5 GRAY, 541.

For whenever a defendant rests his defence upon matter not included in the plaintiff's declaration, he must set the matter out in clear and precise terms.

Bigelow, J. The defendants in this case relied at the trial upon two grounds of defence to the claim of the plaintiff under his policy. One was, that the premises, after the policy was made, and at the time of the fire, were used for the sale of spirituous liquors, contrary to an express stipulation on the part of the plaintiff; and that the policy was thereby rendered void. This ground of defence was fully stated in the answer of the defendants, and the question of fact arising thereon was submitted to the jury, who returned their verdict on this point in favor of the plaintiff.

The other ground of defence was, that spirituous liquors were kept and sold on the premises by the plaintiff at the time the policy was made and issued, and that this use of the premises was not stated by the plaintiff in his application for insurance, as required by the conditions annexed to the policy, and that for this reason, the plaintiff could not recover. This ground of defence was not set out by the defendants in their answer. It appeared, however, in the course of the trial, on the cross-examination of the plaintiff's witnesses, that the premises were so used by the plaintiff at the time of making his application and at the date of the policy. Upon this state of facts, which was not controverted by the plaintiff at the trial, the defendants contended, and asked the court to rule that the plaintiff upon a just construction of the policy, and of the terms and conditions annexed to it, could not recover. The judge who presided at the trial refused so to rule, and it is upon this refusal, that the case now comes before the whole court.

We have not found it necessary to determine whether the facts disclosed by the plaintiff's witnesses, as to the use of the premises at the time the policy was issued, would render it void; because we are of opinion that this defence is not open to the defendants, inasmuch as it was not set forth in their answer. Formerly, by pleading the general issue, everything was open to proof which went to show that the plaintiff's claim was invalid through fraud or illegality,

or was in its inception void in law. *Hulet v. Stratton*, 5 Cush. 539; *Dixie v. Abbott*, 7 Cush. 610. But the Practice Act, St. 1852, c. 312, by abolishing the general issue, and substituting therefor an answer which is required to contain precise, certain, and substantial averments and denials, and providing that every matter averred in the declaration, and not denied by the answer, shall be deemed to be admitted, effected a material change, not only in the forms of pleading, but also in the mode of making up issues of fact between the parties. There being no general form of denying the plaintiff's right to recover, the defendant is compelled by ss. 14, 26, to deny every substantive fact alleged by the plaintiff in his declaration, or declare his ignorance thereof, and leave the plaintiff to his proof. These provisions enable the defendant, by an answer denying the plaintiff's allegations, to put in issue only such matters as are properly averred in the plaintiff's declaration. The plaintiff, by s. 2, is required to make no allegations except those which he is bound by law to prove. Therefore the defendant, by merely answering the allegations in the plaintiff's declaration, can try only such questions of fact as are necessary to sustain the plaintiff's case. He cannot thus put in issue matters which go to defeat or avoid it; and it is accordingly provided by s. 18, that the answer shall set forth in clear and precise terms each substantive fact intended to be relied on in avoidance of the action; by which are intended to be embraced all matters which cannot be proved under the denial of the allegations in the plaintiff's declaration. It follows, as a necessary consequence, that whenever a defendant intends to rest his defence upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out in clear and precise terms in his answer; and as the plaintiff is not bound to aver anything which tends to defeat his action, or which shows that his claim is illegal or void in its inception or otherwise, all such matters must be set out and averred in the answer under the eighteenth section of the practice act. This constitutes the main difference between the system of pleading established by the practice act and that which was previously in force. Thus understood and administered, it is plain that the practice act is intended to bring the parties to a cause by their pleadings to clear and precise issues of fact, and all immaterial and unnecessary averments are wholly excluded.

This decision is but an extension and application, to other forms of declaration, of the principle of construction already laid down by this court in actions on the common counts, or on an account annexed. *Granger v. Ilsley*, 2 Gray, 521.

Applying this construction of the statute to the answer of the defendants in the case at bar, it is manifest that the defence relied upon was not open to the defendants. Proof that the policy was void in its inception, by reason of misrepresentation or concealment on the part of the plaintiff of material facts, was clearly in avoidance of the action. It did not come within any of the allegations contained in the plaintiff's declaration. He was not bound to aver or prove any such fact. It was for the defendants to allege and prove it as a distinct substantive ground of defence.

Exceptions overruled.

J. H. Wakefield for the defendants.

W. Gaston & J. W. May, for the plaintiff.<sup>1</sup>

### SECTION III.

#### TROVER.

#### DEVOE *v.* DR. CORIDON.

IN THE KING'S BENCH. 1638.

REPORTED 1 KEBLE, 305

In trover for jewels, it was said by Twisden, there is no plea in trover, but a release or not guilty, every special plea in justification being but tantamount; but the defendant being in the king's service command, after the declaration delivered, the court gave an imparlance *nisi*, but upon motion the next day of the king's solicitor, ordered the trial.

"The rule of pleading in trover seems to be more correctly stated in 1 Tidd's Practice, 598, thus: 'the defendant may plead specially anything which, admitting the plaintiff had once a cause of action, goes to discharge it.' Thus a release may be pleaded, as was always held; Lofft, 323, Anon., accord with satisfaction; arbitrament and award; former recovery for the same conversion, either in trover or some other concurrent action. Yelv. 67; Broome *v.* Wooton, 1 Shower, 146; Lechmore *v.* Toplady, Skinner, 48, 57; Foot *v.* Rastall, Pollexf. 634; T. Raymond, 472; s.c. 2 Ld. Raymond, 1217; Lamine *v.* Dorrell.

"So the statute of limitations may be specially pleaded in trover. 1 Lutw. 99; Cowper *v.* Towers, Sty. 178; Coles *v.* Sibsy, 7 Mod. 99; Montague *v.* Sandwich, 3 Johns. Rep. 523; Read *v.* Markle,

<sup>1</sup> Part of the opinion, not here material, is omitted. — ED.

Overton's Rep. 19; *White v. Edgman*. In *Markham v. Pitts' Case*, 3 Leon. 295, outlawry of the plaintiff was pleaded after an imparlance, and was held to be a good bar. These two last instances, in which a special plea in bar has been allowed, come fairly perhaps within the spirit of the rule as stated by Mr. Tidd, though not within the letter of it." *Yelverton*, 174 a, note by Mr. Justice Metcalf.

### LYNNER *v.* WOOD.

IN THE KING'S BENCH. 1629.

REPORTED CROKE'S CHARLES, 157.

Trover for divers loads of corn. The defendant pleads, and entitles himself to them as tithes severed; and because the plea amounts but to "not guilty," the plaintiff demurred, and showed for cause, that the plea was therefore not good.

Henden, Serjeant, would have maintained this plea, because it concerns matter in the realty, viz. tithes, and title is pleaded, as it were a confession of the possession in the plaintiff, and as a general bar in action of trespass, and color given.

*Sed non allocatur*; for this action comprehends title in it; and a plea which amounts but to a general issue is not allowable, it being specially shown for cause of demurrer. Whereupon without argument it was adjudged for the plaintiff.

### ROCKWOOD *v.* FEASAR.

IN THE QUEEN'S BENCH. 1585.

REPORTED CROKE'S ELIZABETH, 262.

Action of trover in London. The defendant pleaded, that long before the conversion supposed to be, J. S. was possessed of these goods, as of his own goods, at B. in Norfolk; and that he before the conversion supposed did casually lose them, and they came to the hand of J. Palmer by trover, who gave them to the plaintiff, who lost them in London; and the defendant found them, and afterward did convert them to his own use, by the command of the said J. S. as it was lawful for him to do. It was moved, that this is no plea, for it amounts to the general issue. But all the justices held it a good plea; for it confesseth the possession and property in the plaintiff, against all but the lawful owner. — Nota. This plea was devised by Coke to alter the trial.

## JOHNES v. WILLIAMS.

IN THE KING'S BENCH. 1606.

REPORTED CROKE'S JAMES, 165.

Trover of goods, and converting them. The defendant pleads "sale in market," whereby he justifies the conversion. And it was held to be no plea, because it amounts but to the general issue. And ruled accordingly, that if he did not plead, a nihil dicit should be entered.

## SECTION IV.

## TRESPASS.

(a) *To Plaintiff's Goods.*

"In trespass de bonis asportatis the plea of not guilty operates as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned, but not of the plaintiff's property therein." Chitty, Pleading, \*535. *W. B. R. 17*

## ANONYMOUS.

IN THE QUEEN'S BENCH. 1709.

REPORTED 2 SALKELD, 643.

Trespass for taking his cattle. The defendant pleaded that he was possessed of a close for a term of years, and the cattle trespassed therein, etc. The plaintiff demurred, and judgment was given for the defendant, though he showed no title, but justified upon a bare possession. And this difference was taken by Holt, C. J. Where the action is transitory, as trespass for taking goods, the plaintiff is foreclosed to pretend a right to the place; nor can it be contested upon the evidence who had the right; therefore possession is justification enough. But in trespass quare clausum fregit it is otherwise, because there the plaintiff claims the close, and the right may be contested.

KNAPP *v.* SALSBUURY.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J. Nov. 17, 1810.

REPORTED IN 2 CAMPBELL, 500.

Trespass for running against the plaintiff's post-chaise, in which he was travelling along the highway, with a cart, and killing one of the horses drawing the post-chaise, by the shafts of the cart. Plea, not guilty.

The defence relied upon was, that the chaise and the cart were travelling on the road in opposite directions, and that the collision between them took place through the negligence of the plaintiff, or by mere accident, and without any default on the part of the defendant.

Lord Ellenborough. These facts ought to have been pleaded specially. The only thing to be tried under the plea of not guilty is, whether the defendant's cart struck the plaintiff's chaise and killed his horse. That it did is now admitted; and the intention of the defendant is immaterial. This is an action of trespass. If what happened arose from inevitable accident, or from the negligence of the plaintiff, to be sure, the defendant is not liable; but as he in fact did run against the chaise, and killed the horse, he committed the acts stated in the declaration, and he ought to have put upon the record any justification he may have had for doing so. The plea denying these acts must clearly be found against him.

Verdict for the plaintiff.

Park and Knapp, for the plaintiff.

Jervis, for the defendant.

PEARCY *v.* WALTER.

AT NISI PRIUS, CORAM GASELEE, J. 1834.

REPORTED 6 CARRINGTON &amp; PAYNE, 232.

Under "Not guilty" in trespass, matter may be given in evidence which shows that the defendant did not do the act complained of.

Trespass for driving a gig against a horse of the plaintiff's and wounding it, in consequence of which it died. Plea, not guilty.

Coleridge, Serjt., for the plaintiff. The inquiry to-day is limited to the ascertaining whether the defendant did or did not drive against the plaintiff's horse. Any inquiry as to whether the injury arose from the plaintiff's negligence, or from the negligence

~~of both plaintiff and defendant, or from inevitable accident, cannot be gone into here, as the general issue only is pleaded.~~

It appeared that the defendant's gig and a van of the plaintiff's were both in motion, going in opposite directions at the time when the injury was done, which consisted of the shaft of the defendant's gig entering the shoulder of one of the plaintiff's horses, in consequence of which it died. On the part of the plaintiff a witness swore that the defendant, being intoxicated, drove against the plaintiff's horse.

Bompas, Serjt., for the defendant. The question is, whether the witness is to be believed, who swears to the defendant's driving against the plaintiff's horse? In point of law, if it was inevitable accident, it may be proved under the general issue. Goodman *v.* Taylor.<sup>1</sup>

Gaselee, J. It may be shown under the general issue, that, instead of the defendant driving against the plaintiff, the plaintiff drove against the defendant.

Coleridge, Serjt., assented.

Witnesses were called on the part of the defendant.

Gaselee, J., told the jury that the question was, how the shaft got into the horse's shoulder? Whether the defendant drove the shaft against the van horse, or the van horse was driven against the shaft?

Verdict for the plaintiff — Damages, £20.

Coleridge, Serjt., and Butt, for the plaintiff.

Bompas, Serjt., and Hoggins, for the defendant.

[Attorneys, Horsley and Taylor.]

### MILMAN *v.* DOLWELL.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J. 1810.

REPORTED 2 CAMPBELL, 378.

Or which denies the plaintiff's title to the subject of the trespass.

~~This was an action of trespass for cutting the plaintiff's barges from their moorings in the river Thames; whereby they had been set adrift and been injured.~~

It appeared that at a time when there was a great quantity of ice in the Thames, the defendant took two barges of the plaintiff from the middle of the river, where they were moored, to the opposite shore, and that one of them was immediately after dis-

<sup>1</sup> See the cases of *Boss v. Litton*, 5 C. and P. 407, and *Goodman v. Taylor*, 5 C. and P. 410.

covered to have a hole in its bottom; but there was no evidence to show how this had been occasioned.

Garrow, for the defendant, offered to prove, that, at the time of the supposed trespass, these barges were in the greatest danger of being carried away by the ice; that if he had not interfered, they most probably would have been destroyed; that he did what was prudent and most for the plaintiff's advantage to be done under the circumstances; and that he had been employed by the plaintiff generally to take charge of the barges, and must be presumed to have had his authority to remove them from a place of danger to a place of safety.

Lord Ellenborough. These facts should have been specially pleaded. I cannot admit evidence of them under the plea of not guilty; the issue joined upon which is, whether the defendant removed barges belonging to the plaintiff from their moorings, not whether he was justified in doing so.

Garrow argued that the plea of not guilty merely denied the committing of any trespass; and it was impossible to say that any trespass was committed, if the barges were removed by the plaintiff's own orders, either express or implied. The case was the same as if the plaintiff had stood by and directed how the thing was to be done; and the unmooring of the barges must be considered the act of the plaintiff rather than of the defendant.

Lord Ellenborough. The defendant allows that he intermeddled with goods which were the property and in the possession of the plaintiff. By so doing he is (presumed) to be a trespasser; and if he has any matter of justification, he must put it upon the record. The plea of not guilty only denies the act done, and the plaintiff's title to the subject of the trespass. If the defendant has any authority, general or particular, express or implied, from the plaintiff, this must be specially pleaded, by way of excuse.

Garrow then offered to prove that these barges were frozen to some others belonging to J. S., by whom the defendant was employed to get the latter ashore, and that it was utterly impossible to do this without bringing the former along with them.

Lord Ellenborough. If the necessity was inevitable, and the barges of the third person by whose express orders the defendant acted must otherwise have been destroyed, this might have amounted to a justification; but, like the first set up, it must have been put upon the record.

The jury found a verdict for the plaintiff, with one farthing damages.

Garrow afterwards moved for a new trial, on the ground that the



evidence had been improperly rejected; and further contended, that the action should have been case and not trespass; but the court were against him on both points, and refused a rule to show cause.<sup>1</sup>

Park, Jekyll, and Lawes, for the plaintiff.  
Garrow and Topping, for the defendant.  
[Attorneys, Evans and Hill.]

### FURNEAUX v. FOTHERBY AND CLARKE.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J. 1815.

REPORTED 4 CAMPBELL, \*136.

Hence, if the defence is that the goods were taken under license by law, it should be pleaded.

Trespass for breaking and entering the plaintiff's house and distraining his goods. Plea, the general issue.

It was proved, that the defendant, Fotherby, on the 1st of October last, did enter the plaintiff's house, and make the distress, but there was no evidence against Clarke.

The defence was, that the plaintiff had held another house as tenant to the defendant Clarke; that the goods distrained were clandestinely and fraudulently conveyed away from this house on this 28th of September, to prevent the landlord from distraining them for the arrears of rent to become due the following day, and that they were within 30 days afterwards taken and seized as a distress for the said arrears of rent.

Holt, for the plaintiff, first contended, that there was no right to follow these goods, as they were removed before the rent became due, Watson v. Main, 3 Esp. 15; and, 2dly, that at all the events this was no defence under the general issue, as the goods were not taken upon the premises for which the rent became due, Vaughan v. Davis, 1 Esp. 257.

Lord Ellenborough. Upon the first point I entertain considerable doubts, and if the cause had turned upon that, I should have reserved it for the opinion of the court. Where goods are fraudulently removed from the premises in the night, to prevent the landlord from distraining upon them for arrears of rent to become due next morning, the case certainly comes within the mischief intended to be remedied by 11 Geo. II. c. 19, and there is some ground to contend that it comes within the provisions of that

<sup>1</sup> Vide Com. Dig. Pleader, 3 M. 20-39; Bull. N. P. 90.

statute. But, upon the 2d point, I am clearly of opinion, that the defendant was bound to justify specially.<sup>1</sup>

The plaintiff had a verdict against Fotherby; and Lord Ellenborough granted a certificate under 8 & 9 W. III. c. 11, that there was reasonable ground to join Clarke as a defendant, for the purpose of depriving him of a right to costs.<sup>2</sup>

Holt and E. Lawes, for the plaintiff.

Park, for the defendant.

(b) *To Plaintiff's Servant.*

TORRENCE *v.* GIBBONS.

IN THE QUEEN'S BENCH. 1843.

REPORTED IN 5 QUEEN'S BENCH REPORTS, 297.

Declaration for that defendant, to wit, on, etc., and on divers other days, etc., debauched Josephine Amelia Torrence, the daughter of plaintiff, "who during all the time aforesaid was, and still is, the servant of the plaintiff;" whereby she became pregnant, till she was delivered, etc.; special damage for loss of service, expenses, etc.

Plea, "that the said J. A. Torrence was not the servant of the plaintiff, in manner and form," etc.

Demurrer, assigning for causes that the plea is argumentative and insufficient in this, to wit, that defendant, instead of simply pleading that he is not guilty of the grievances set forth in the declaration, hath denied the same in a circuitous and argumentative manner, by alleging that the said J. A. T. was not the servant of plaintiff; for, if J. A. T. was not the servant of plaintiff, defendant could not be guilty of the grievance set forth in the declaration; and for that the plea amounts to not guilty, and ought to have been pleaded in that form.

Joinder in demurrer.

Atherton, for the plaintiff. The fact of the service would be put in issue by a plea of not guilty. Such a plea puts the "wrongful act" in issue. R. Hil. 4 Will. IV.; Pleadings in Particular Actions, IV. 1; that is, either the act or that which constitutes its wrongfulness. In trover, not guilty denies the conversion only, not the title; in an action for obstructing a right of way, the obstruction only, not the right; but in an action for a nuisance, it denies "that the defendant carried on the alleged trade in such a way as to be

<sup>1</sup> *Vide* 11 Geo. II. c. 19, § 1, 2; 2 Wms. S. 284 (n. 2).

<sup>2</sup> *Vide* Aaron *v.* Alexander, 3 Campb. 36.

a nuisance to the occupation." [Lord Denman, C. J. There is no illegality if there be no annoyance.] Then to which class does this action belong? If there be no illegality independently of some particular fact, that fact is put in issue. The mere seduction of the daughter is, legally speaking, no injury. It is not like a trespass to the person of the plaintiff, which *primâ facie* is an injury. It may be that, if the relation could have been formally alleged by way of inducement, the plea of not guilty would have admitted it; that is so in trover. But here the form of the declaration makes the relation the gist of the complaint. The whole action depends upon the resulting damage, to which the relation is essential. The case resembles *Sutherland v. Pratt*, 11 M. & W. 296. [Lord Denman, C. J. There, unless the contract was made with the plaintiff, the alleged contract was not proved.]

Byles, Serjeant, *contra*. The relation is, in effect, mere inducement. The case is the same as if the declaration commenced by reciting that the plaintiff's daughter was his servant. The analogy of an action for obstructing a right of way applies. In *Taverner v. Little*, a declaration in trespass alleged that defendant was possessed of a cart and horse, and complained of injury done by negligent driving of them: and it was held that not guilty admitted that the cart and horse were in defendant's possession. That decision was acted on in *Hart v. Crowley*, 12 A. & E. 378. It is not true that the wrongfulness of the act is put in issue by not guilty; *Frankum v. The Earl of Falmouth* decides the contrary. *Holloway v. Abell*, 7 C. & P. 528, is the only authority to be found in favor of the plaintiff: that was merely a decision at *nisi prius*; and the verdict there prevented the question from being raised *in banc*, as the jury affirmed the service. In an action for criminal conversation, not guilty would not put the marriage in issue.

Atherton, in reply. No attempt has been made to get rid of the distinction suggested between cases where the act is a *primâ facie* cause of action, and those where the damage arising from a particular relation is the very gist of the action. That distinction explains all the authorities cited on the other side. Thus the obstruction of a way is *primâ facie* an injury. But there is no legal injury in seduction, unless the relation of servant exist. [Coleridge, J. In an action for words injurious only in respect of the plaintiff's trade, not guilty does not put the trade in issue.] The example stated in the general rule as to an action for nuisance applies.

Lord Denman, C. J. It seems to me that the example is rather against you. No one can complain of an act that is not offensive at all. But, besides, the owner is the only person who can com-

plain; his ownership is essential to the right of action; yet that is not traversed by not guilty. So here the seduction injures the plaintiff, because he is the master of the party seduced; and the same rule must be applied.

Williams, J., concurred.

Coleridge, J. I am of the same opinion. I may mention that Mr. Justice Littledale, before the new rules, considered the service to be a necessary result of the residence of the daughter with the father. He once, in an undefended cause, *Maunder v. Venn*, Moo. & M. 323, in which I was counsel, where the residence was proved, held it unnecessary to give evidence of acts of service.

Wightman, J., concurred.

Judgment for defendant.

(c) *To Plaintiff's Land.*

JONES *v.* CHAPMAN AND OTHERS.

IN THE EXCHEQUER CHAMBER. 1849.

REPORTED IN 18 LAW JOURNAL REPORTS, EXCHEQUER, 456.

Before the Hilary Rules, the defendant under not guilty to trespass qu. cl. fr. might give in evidence title in himself or in another by whose command he entered.

Trespass for breaking and entering the plaintiff's dwelling-house.

Plea, that the dwelling-house in the declaration mentioned was not at the time when, etc., the dwelling-house of the plaintiff, modo et formâ; upon which issue was joined.

At the trial, which took place before Parke, B., at the summer assizes for the county of Denbigh, in 1845, that learned judge told the jury that they ought to find the issue for the defendant, if they were satisfied by the evidence on the part of the defendant that at the said time when, etc., one Harriet Middleton was entitled to the possession of the dwelling-house, and the defendant had committed the alleged trespass under her authority. To this direction the counsel for the plaintiff tendered a bill of exceptions to the effect that the learned judge should have directed the jury to find for the plaintiff, if they were satisfied by the evidence that at the time when, etc., he was in the actual possession of the dwelling-house. Upon the argument before this court,<sup>1</sup> on the 1st of December, 1847,

Welsby appeared on behalf of the plaintiff; and

Peacock, on behalf of the defendant.

*Cur. adv. vult.*

<sup>1</sup> Wilde, C. J., Coleridge, J., Coltman, J., Maule, J., Wightman, J., Erle, J., and V. Williams, J.

The court differing in opinion, their lordships now delivered their judgments *seriatim*.

Williams, J., after stating the facts of the case, proceeded as follows: In this case the general question is raised for our decision, as a court of error, whether under a traverse of the allegation in the declaration of trespass *quare clausum fregit*, that the close was the close of the plaintiff, the defendant is, or is not, at liberty to show title in himself or some other person, under whose authority he claims to have acted. I am of opinion that he is. I have not formed this opinion without hesitation, because it is in direct opposition to the judgment of the court of Queen's Bench, in *Whittington v. Boxall*, 5 Q. B. Rep. 139; s. c. 12 Law J. Rep. (N. S.) Q. B. 318; but on consideration of that judgment, and of the authority and reasoning on which it is founded, it appears to me to have been wrongfully given. The question turns on the construction of the new rules of pleading of Hilary Term, 4 Will. IV. Before those rules it had long been settled law that under the general issue of not guilty, in trespass *quare clausum fregit* the defendant might give evidence of title in himself or in another by whose command he entered. The case of *Argent v. Durrant*, 8 Term Rep. 403, shows conclusively the establishment of this doctrine, and also discloses the principle on which it was grounded, namely, that the evidence falsified the declaration of the plaintiff, inasmuch as it proved that the defendant did not break the plaintiff's close, as the declaration set forth. Thus it appears at the time the New Rules were made the general issue in trespass *quare clausum fregit*, by reason of its traversing the allegation in the declaration, that the close in which, etc., was the close of the plaintiff, operated as a denial, not only of his possession, but also of his right of possession as against a defendant lawfully entitled thereto. But by the rule of Hilary Term, 4 Will. IV. in trespass it is ordered, "that in actions of trespass *quare clausum fregit*, the plea of 'not guilty' shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially." The alteration which this rule introduces appears to be this, that the defendant, if he intends to deny the plaintiff's possession or right of possession, must, instead of denying it as heretofore by the general issue, deny it by traversing it specially. It must be confessed that the language employed in this rule is not very happily chosen, for the expression, "a special traverse," usually bears a particular technical sense, namely, that of a traverse containing an inducement and *absque hoc*, in which sense it is scarcely possible it could have

been intended to have been used; and I understand that the rule in this respect is merely in order to enable the defendant to dispute, if he is the wrong-doer, the possession, or, if he claims title, the right of possession, — the allegation in the declaration, that the close in which, etc., is the close of the plaintiff, must be denied specially by a particular traverse, in contradistinction to being denied generally as heretofore, by the plea of "not guilty." It is true, that by the terms of the rule, taken literally, it is not this allegation of the plaintiff's possession, or right to possession, which is to be traversed; but it is a principle of pleading that the defendant cannot traverse any matter which is not alleged or necessarily implied in the declaration, and the possession, or right of possession, is only alleged or necessarily implied in a declaration in trespass *quare clausum fregit*, as being included in the allegation that the close in which, etc., is the close of the plaintiff. If this be so, then the defendant in the present case, inasmuch as by the plea in question he has denied the plaintiff's allegation that the dwelling-house in which, etc., was his dwelling-house, must be considered as specially traversing the plaintiff's right to possession thereof, and is therefore within the meaning of the New Rules. He has put himself in the same situation as that in which he would have been before the New Rules, if he had traversed it generally by pleading not guilty, and he is consequently at liberty to show title in himself or in another, under whose authority he acted. For these reasons, I am of opinion that the judge's direction at the trial was correct, and that our judgment on this writ of error ought to be for the defendant.<sup>1</sup>

<sup>1</sup> Wilde, C. J., Erle, J., and Coltman, J., delivered opinions substantially coinciding with that of Williams, J. Maule, J., concurred with the majority in their conclusion, though not in their reasoning. "I agree with the exception of the plaintiff in error that the question raised by the issue of not possessed is, whether the plaintiff was in actual possession or not; but it seems to me that as soon as a person is entitled to possession and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by the command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who so entered." Coleridge, J., and Wightman, J., delivered dissenting opinions, on the ground that the plea of not possessed put in issue only the actual possession of the plaintiff; Coleridge, J., taking the view that a defendant who wished to put in issue the plaintiff's right of possession, must resort to a distinct specific traverse to that effect; while Wightman, J., thought that a defendant who relied on right of possession either in himself or some third person under whom he acted, should plead such right of possession by way of confession and avoidance. The full opinions have been omitted on account of their length. — Note by James Barr Ames, Cases on Pleading, 105.

COWLISHAW *v.* CHESLYN.

EXCHEQUER OF PLEAS, 1830,

REPORTED 1 CROMPTON AND JERVIS, 48.

A traverse by the defendant of (one only) of two or more material allegations is so far an implied admission of the matter not denied, that the pleader is estopped at the trial to introduce evidence in denial of the allegation untraversed.

Trespass *quare clausum fregit*. Pleas, first, a right of way by prescription. Secondly, that, in 1762, one Anne Cowlishaw was seised in fee, and being so seised, by a deed, lost by time and accident, granted a right of way; and, thirdly, a common highway. The plaintiff replied to the first plea, traversing the prescription; to the second plea, that Anne Cowlishaw did not grant *modo et forma*; and to the third plea, denying the common highway.

At the trial before Garrow, B., at the last Lent Assizes for the county of Leicester, the first plea was disproved, it appearing that all the ancient roads over the *locus in quo* had been extinguished by an enclosure act; and the jury negated the common highway pleaded in the third plea. The case, therefore, depended on the second plea, and upon that plea there was conflicting evidence as to the exercise of the alleged right of way. The plaintiff offered evidence of old deeds, and of a will, to show that Anne Cowlishaw had only an estate as a co-trustee with one Farnell, in trust for Anne Cowlishaw's son, who, at the time of the supposed grant, was a minor; and he contended that this evidence was admissible on the issue in question, for the purpose of showing that Anne Cowlishaw was not likely to have made the grant, not having had any legal right so to do. The defendant's counsel objected to the evidence, on the ground that Anne Cowlishaw's seisin in fee was admitted on the record, and that the plaintiff was estopped, by the state of the pleadings, from giving any evidence to negative that fact. The learned judge received the evidence, reserving the question of its admissibility for the opinion of the court. The defendant then offered evidence of an award of the *locus in quo*, made under an enclosure act, to Anne Cowlishaw, which alone, they contended, vested the soil in her; but which, the plaintiff contended, vested it in the persons in whom the legal estate in the land, to which this allotment was made, had been before vested under the will.<sup>1</sup> The learned judge left the whole of the evidence to the

<sup>1</sup> As to this point, which it became unnecessary to decide in the principal case, see *Doe dem. Sweeting v. Hellard*, 9 B. & C. 789 (E. C. L. R. vol. 17).

jury, and directed them to consider whether there was such evidence of the use of the right of way, as to lead them to suppose that Anne Cowlshaw had made the grant in question; and he told them, that they might assume, for the purposes of their verdict, that she had a legal right to make such grant. The jury found a verdict for the defendant upon the second plea.

Balguy had obtained a rule to enter a verdict for the plaintiff on the second plea, or for a new trial, against which cause was now shown by —

Denman, R. N. Clarke, and Humfrey.<sup>1</sup> — On these pleadings, the only question was on the grant, as no issue was taken on the seisin of Anne Cowlshaw, as alleged in the second plea. If the plaintiff on this issue could be allowed to give in evidence documents to disprove the seisin of Anne Cowlshaw, which documents are in his exclusive possession, and the contents of which were unknown to the defendant, the latter would have been entirely misled, as he would only come prepared to prove the grant. The plaintiff could only traverse one of the facts alleged in the plea. If he attempted to put more than one in issue, the replication would have amounted to the general replication of *de injuriâ*, which is clearly bad in such a case. Crogate's Case, 8 Rep. 66; Cockerell v. Armstrong, Willes, 99. It was not competent for the plaintiff to give any evidence to negative any part of the plea, which was admitted by the traverse being taken on another allegation. This would give him the advantage of the general replication of *de injuriâ*. The plaintiff had his choice which allegation to traverse; and if he is allowed, on a traverse of one allegation, to dispute another, there is no reason why he may not dispute the whole plea, which he clearly cannot do, as *de injuriâ* cannot be replied, when an easement or other interest in the land is claimed. The present is a strong case to show the good policy and utility of the rule of law contended for by the defendant, for the real merits arise on the allegation of the seisin in Anne Cowlshaw, equally as if it had been laid in any other person; and if the allegation of seisin in Anne Cowlshaw had been traversed, the only effect would have been to have caused the defendant to amend, by adding pleas, laying the seisin in different persons; and the same evidence which was produced at the trial to prove the grant by Anne Cowlshaw would equally have proved a grant alleged to have been made by any other person who might appear to have been the owner of the fee. There is no such

<sup>1</sup> The arguments, as to the right of A. Cowlshaw to grant, are omitted, as the judgment of the court proceeded entirely on the question of the admissibility of the evidence, on the issue taken upon the grant.



principle as that which was contended for by the other side, that a party may be estopped by an admission on the record for one purpose, and not for another, in the same cause. In the present case, the seisin of Anne Cowlishaw was admitted on the record, and the plaintiff was estopped from giving any evidence in contravention of that admission. The evidence, therefore, was clearly inadmissible, and the defendant is entitled to retain his verdict.

Balguy and Clinton, *contra*.—The evidence in question was admissible, not to contradict the allegation on the record, but to negative the fact of Anne Cowlishaw having made the grant. The user is only presumptive evidence of the grant; and it was competent for the plaintiff to show that Anne Cowlishaw was not seised in fee, and could not, therefore, in point of law, have made such a grant. She ought not to be presumed to have done an act contrary to law. The question for the jury was purely one of fact, whether the deed was or was not made. There is a distinction between presumptions of law and of fact. The latter may always be rebutted by contrary evidence. The question, whether a particular deed ever had existence, in cases like the present, is of the latter class. The principles on this branch of the law are thus stated by a learned author:<sup>1</sup> “The presumption of right in such cases is not conclusive; in other words, it is not an inference of mere law, to be made by the courts; yet it is an inference which the courts advise juries to make whenever the presumption stands unrebutted by contrary evidence. Such evidence in theory is mere presumptive evidence.” The same learned writer,<sup>2</sup> citing *Barker v. Richardson*, 4 B. & A. 579,<sup>3</sup> lays down in another passage the law on this subject in the following terms: “The technical presumption necessarily assumes that it was practicable to transfer the right by means of a grant or other conveyance; hence the presumption does not operate where such a grant could not, from the nature of the case, have been made.” In the present case Anne Cowlishaw could not legally have made the grant in question; and even if the evidence had been all one way, as to the user of the right of road, the presumption of the grant would have been rebutted by the evidence which was offered of the state of the title at the time when the alleged grant was supposed to have been made. The learned judge, therefore, ought to have directed the jury to find a verdict for the plaintiff on the second plea; and, at all events, he ought not to have told the jury that they might assume, for the purposes of their verdict, that Anne Cowlishaw had the legal right to make the grant. That direction

<sup>1</sup> Starkie's Evid. 1214.

<sup>2</sup> Ibid. 1218.

<sup>3</sup> E. C. L. R. Vol. VI.

was calculated to lessen the effect of the evidence on the minds of the jury, and entitles the plaintiff at least to a new trial.

*Cur. adv. vult.*

Vaughan, B. This was an action of trespass *quare clausum fregit*, in which the defendant pleaded no general issue, but three special pleas: first, a prescriptive right of way; secondly, that Anne Cowlshaw, being seised in fee, granted a right of way by lost deed; and, thirdly, a common highway. The first and third pleas were properly negated on the evidence which was given at the trial, and the only question therefore was upon the second plea, upon which the jury found a verdict for the defendant. **The present** is an application, on the part of the plaintiff, to enter a verdict upon the issue on the second plea, or for a new trial: in the consideration of which question, it becomes material to refer to the second plea, and the issue upon that plea. The second plea states, that Anne Cowlshaw was seised in fee, and, being so seised, granted the way in question by lost grant; and the replication to that plea is, simply, that she did not grant *modo et formâ*. It was competent for the plaintiff to traverse either the seisin of Anne Cowlshaw or the grant by her. The former is [not?] traversed, and therefore it seems to me and to the court, that it must be taken against the plaintiff conclusively that she was seised in fee. But it was contended for the plaintiff, that the evidence was admissible, not to disprove the seisin of Anne Cowlshaw, but, as an ingredient, to rebut the existence of the grant, which was a mere presumption of fact; because, if she had no authority to grant, it was unlikely, under such circumstances, that she should have made the grant. It is a satisfactory answer to this argument, that the plaintiff is estopped by the state of the pleadings, and therefore cannot be received to contradict that which is admitted upon the record. Under these circumstances, evidence to negative the seisin of Anne Cowlshaw was not properly receivable, and therefore the learned judge was perfectly correct in directing the jury to presume, for the purposes of their verdict, that Anne Cowlshaw was seised in fee. We therefore think, that the rule to enter a verdict for the plaintiff should be discharged; but, as there seems to have been conflicting evidence in this case, and as the verdict might affect the inheritance, the plaintiff may have a new trial, upon payment of costs, the defendant being at liberty to amend his pleadings as he shall be advised.

Rule accordingly.

J. DODD *v.* KYFFIN.

IN THE KING'S BENCH. 1797.

REPORTED 7 TERM REPORTS, 354.

In trespass the defendant may, under the general issue, give evidence of title.

Trespass for breaking and entering the plaintiff's close called the Chapelfield, on the 30th March, 1793. Plea, the general issue. At the trial before the Chief Justice of Chester the plaintiff gave evidence of his being in possession of the close at the time of the trespass alleged, by proof of different acts of husbandry exercised by him therein down to that period and afterwards. It appeared that the close belonged to a chapel, of which Mr. Evans had been minister for some years, till his death in December, 1792, during which time it was held under him by one G. Dodd. Before the day of the alleged trespass, Mr. Price had succeeded as minister of the chapel; and the defendant offered to call a witness<sup>1</sup> to prove that previous to that day Price had verbally demised the close to him the defendant. The Chief Justice said he would receive any evidence to show the actual possession out of the plaintiff at the time of the supposed trespass, but he thought that under the plea of (not guilty) he could not receive any evidence of title or of the right of possession being in the defendant; nothing being in issue but the fact of the trespass on the actual possession of the plaintiff. Some evidence was afterwards given to show a possession in Price at the time; and the Chief Justice left the whole to the jury to find their verdict according as they believed that the possession was in or out of the plaintiff at the time; and they found a verdict for the plaintiff.

Manley in the last term obtained a rule to show cause why the verdict should not be set aside, because the evidence offered had been rejected: and also because, admitting the possession to be dubious, trespass would not lie.

Leycester and Hinchliffe now showed cause against the rule, and contended that title could not be given in evidence on the general issue in trespass, but if meant to be insisted on it ought to have been pleaded. They admitted that a lease from a third person might be given in evidence, to disprove the fact of the plaintiff's possession; but the evidence in question was not offered on that ground. They mentioned *Dove v. Smith*, 6 Mod. 153, where Holt,

<sup>1</sup> The same witness had before proved facts which rendered the question of possession doubtful.

Ch. J., said, "upon not guilty the defendant could not give any matter of right in evidence." Bull. Ni. Pri. 90. (*vide* Tri. per Pais, 526), and Bartholomew *v.* Ireland, Andr. 108, in which latter they observed there was a plea of *liberum tenementum*, and consequently what was said as to giving such evidence on the general issue was extrajudicial. But

*ull* The court were clearly of opinion that the defendant ought to have been permitted to give evidence of title and of right to possession under the general issue; and therefore they made the

Rule absolute.

### PICKERING *v.* RUDD.

AT NISI PRIUS, LORD ELLENBOROUGH, C. J. 1815.

REPORTED 4 CAMPBELL, 219.

Or contend that the plaintiff has misconceived his action.

Trespass for breaking and entering the plaintiff's close, and placing a board over it, and cutting a tree, etc.

Plea, not guilty as to the *clausum fregit*; and as to cutting the tree, a justification that it was wrongfully growing against the wall of the defendant, and that he therefore removed it, as he lawfully might. New assignment of excess, and issue thereupon.

The defendant's house adjoins to the plaintiff's garden, the *locus in quo*; and to prove the breaking and entering of this, the evidence was, that the defendant had nailed upon his house a board, which projected several inches from the wall, and so far overhung the garden.

Garrow, A. G., and Richardson, for the plaintiff, contended that this was a trespass for which he had a right to maintain the present action. *Cujus est solum, ejus est usque ad cælum.* The space over the soil of the garden is the plaintiff's, like the minerals below, and an invasion of either is, in contemplation of law, a breaking of his close. A mere temporary projection of a body through the air across the garden may not be actionable; but where a board is caused permanently to overhang the garden, this is a clear invasion of the plaintiff's possession. If this be not a trespass, it is easy to conceive that the whole garden may be overshadowed and excluded from the sun and air without a trespass being committed.

Lord Ellenborough. I do not think it is a trespass to interfere with the column of air superincumbent on the close. I once had occasion to rule upon the circuit, that a man who, from the outside of a field, discharged a gun into it, so as that the shot must have

struck the soil, was guilty of breaking and entering it. A very learned judge who went the circuit with me at first doubted the decision, but I believe he afterwards approved of it, and that it met with the general concurrence of those to whom it was mentioned. But I am by no means prepared to say, that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded. If any damage arises from the object which overhangs the close, the remedy is by an action on the case. Here the verdict depends upon the new assignment of excess in cutting down the tree.

The jury found for the defendant.

Garrow, A. G., and Richardson, for the plaintiff.

Jervis and Abbott, for the defendant.

[Attorneys, Caley and Presland.]

(d) *To Plaintiff's Person.*

RIGG'S CASE.

AT NISI PRIUS, BEFORE CRAWLEY, J. AUGUST, 1633.

REPORTED CLAYTON, 24, *placitum* 41.

The extent stated to which justification of a battery is admissible under "not guilty."

**R**igg brought an action of battery, and the case was, the plaintiff was a boy and did press to come into a cockpit to see the game, and the master of the pit, endeavoring to put him forth, he resisted him; the master thereupon pulled him by the ear so that it bled, and the boy by his guardian sues this action, and the master pleaded not guilty; for this it was against him, but by Davenport, Judge, some opinion was that by good pleading in this case the master of the pit might have justified the act well enough, but could not plead not guilty.

## GIBBONS v. PEPPER.

IN THE KING'S BENCH. 1695.

REPORTED 1 LORD RAYMOND, 38.

Trespass, assault and battery. The defendant pleads, that he rode upon a horse in the king's highway, and that his horse being affrighted ran away with him, so that he could not stop the horse; that there were several persons standing in the way, among whom the plaintiff stood; and that he called to them to take care, but that, notwithstanding, the plaintiff did not go out of the way, but continued there; so that the defendant's horse rode over the plaintiff against the will of the defendant; *quæ est eadem transgressio*, etc. The plaintiff demurred. And Serjeant Darnall for the defendant argued, that if the defendant in his justification shows that the accident was inevitable, and that the negligence of the defendant did not cause it, judgment shall be given for him. To prove which he cited Hobart, 344; Weaver v. Ward, Mo. 864, pl. 1192; 2 Roll. Abr. 548; 1 Brownl. prec. 188.

Northey for the plaintiff said, that in all these cases the defendant confessed a battery which he afterwards justified; but in this case he justified a battery, which is no battery. Of this opinion was the whole court; for if I ride upon a horse, and J. S. whips the horse, so that he runs away with me, and runs over any other person, he who whipped the horse is guilty of the battery, and not me. But if I by spurring was the cause of such accident, then I am guilty. In the same manner, if A. takes the hand of B. and with it strikes C., A. is the trespasser, and not B. And, *per curiam*, the defendant might have given this justification in evidence, upon the general issue pleaded. And therefore judgment was given for the plaintiff,

## CASE.

"In actions upon the case, the defendant, upon the general issue of not guilty, may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may offer any matter in excuse or justification of it; or he may set up a former recovery, release, or satisfaction: For an action on the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so; and therefore such a former recovery, release, or satisfaction need not be pleaded,

but may be given in evidence: since, whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may in this action be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only." Tidd, Practice, 650.

### UNDERWOOD *v.* PARKS.

IN THE KING'S BENCH. 1743.

REPORTED 2 STRANGE, 1200.

In an action for words, the defendant pleaded not guilty, and offered to prove the words to be true, in mitigation of damages: which the Chief Justice refused to permit, saying that at a meeting of all the Judges upon a case that arose in the Common Pleas, a large majority of them had determined, not to allow it for the future, but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words. That this was now a general rule amongst them all, which no judge would think himself at liberty to depart from, and that it extended to all sorts of words, and not barely to such as imported a charge of felony.

### BROOK *v.* SIR HENRY MONTAGUE, RECORDER OF LONDON.

IN THE KING'S BENCH. 1605.

REPORTED CROKE'S JAMES, 90.

Action for words; for that the defendant at such a place in Surrey spake these words of the plaintiff: "He was arraigned and convicted of felony, etc." The defendant pleads, that the plaintiff at another time brought false imprisonment against J. S., one of the serjeants of London, who justified by warrant from Sir Nicholas Mosely, Mayor of London, for arresting him to find sureties for the good behavior; and they were thereupon at issue; and found against the plaintiff, who brought an attain: and the defendant being *consiliarius et peritus in lege*, was retained to be of counsel with the petty jury; and in evidence at the trial in London spake those words in the declaration; and so justifies. Yelverton and Coke, Attorney-General, were of counsel for the defendant.

The court resolved that the justification was good; for a counselor in law retained hath a privilege to enforce anything which is

informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false ; but it is at the peril of him who informs it : for a counsellor is at his peril to give in evidence that which his client informs him, being pertinent to the matter in question ; otherwise action on the case lies against him by his client, as Popham said. But matter not pertinent to the issue, or the matter in question, he need not to deliver ; for he is to discern in his discretion what he is to deliver, and what not ; and although it be false, he is excusable, being pertinent to the matter : but if he give in evidence anything not material to the issue which is scandalous, he ought to aver it to be true, otherwise he is punishable ; for it shall be intended as spoken maliciously and without cause ; which is good ground for an action. So if a counsellor object matter against a witness which is slanderous, if there be cause to discredit his testimony, and it be pertinent to the matter in question, it is justifiable what he delivers by information, although it be false. So here it is material evidence to prove him a person fit to be bound to his good behavior, and in maintenance of the first verdict ; therefore his justification good.

“Coke cited a case, where *Parson Prick* in a sermon recited a story out of Fox’s Martyrology, that one Greenwood, being a perjured person, and a great persecutor had great plagues inflicted upon him, and was killed by the hand of God ; whereas in truth he was never so plagued, and was himself present at that sermon ; and he thereupon brought his action upon the case, for calling him a perjured person ; and the defendant pleaded *not guilty*. And this matter being disclosed upon the evidence, Wray, Chief Justice, delivered the law to the jury, that it being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously, and so was found not guilty.” Y. B. 14 Hen. VI. pl. 14 ; Y. B. 20 Hen. VI. pl. 34.

And Popham affirmed it to be good law, when he delivers matter after his occasion as matter of story, and not with any intent to slander any. — Wherefore, for these reasons, it was adjudged for the defendant.

“[In actions on the case ] it was always necessary to plead the statute of limitations specially.” Chitty, Pleading, Vol. I. p. \*526.



## LILLIE v. PRICE.

IN THE KING'S BENCH. 1836.

REPORTED 5 ADOLPHUS &amp; ELLIS, 645.

Privileged communications need not be specially pleaded.

Declaration for libel contained in a letter. **Plea, not guilty.** On the trial before Lord Denman, C. J., at the sittings in Middlesex after last Trinity Term, the defence was that the alleged libel was a privileged communication. The defendant's counsel objected that this answer could not be given under the plea of not guilty. The Lord Chief Justice thought otherwise, and left the whole case to the jury, who found for the defendant.

Sir W. W. Follett in this term <sup>1</sup> moved for a rule to show cause why a new trial should not be had, on the ground of misdirection. It has never yet been decided that in an action for libel the defence of privileged communication may be set up, under a plea of the general issue. **The point** was brought before the Court of Common Pleas, but not decided, in *Smith v. Thomas*, 2 New Ca. 372. In the rules, Hil. 4 Will. IV., Pleadings in Particular Actions, IV. 1, 5 B. & Ad. ix, it is said that the plea of not guilty, in an action for slander of the plaintiff in his office, profession, or trade,<sup>2</sup> "will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged." But it cannot be inferred from this that the same plea will let in the defence of privileged communication, which involves matter not properly determinable by a jury. The mere plea of not guilty does not give the plaintiff any notice of such a defence. In *Stancliffe v. Hardwick*, 2 Cro., M. & R. 1; s. c. 5 Tyr. 551. Where a question of the same kind arose as to the admissibility of evidence, in an action of trover, to justify the conversion, it was held that, to let in such a defence, the plea ought to have been special. Cases bearing some analogy to the present have arisen in actions of assumpsit, as *Barnett v. Glossop*, 1 New Ca. 633, and where the defence was the want of a written contract to satisfy the statute of frauds, it has been held, since the New Rules, that that must be

<sup>1</sup> November 5. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, JJ.

<sup>2</sup> The slander in the present case was not charged as affecting the plaintiff in any particular capacity.

specially pleaded.<sup>1</sup> [Lord Denman, C. J. In the instance of an action of slander, mentioned in the rule of pleading just cited, it is said that the plea of not guilty will operate as before, in denial of having spoken the words maliciously.] *Cur. adv. vult.*

Lord Denman, C. J., now said: We have consulted the other judges on this point, and are of opinion that the defence of privileged communication, as it goes to the very root of the matter of complaint, need not be specially pleaded. Rule refused.<sup>2</sup>

## SECTION VI.

### DETINUE.

"In detinue the defendant pleadeth non detinet, he cannot give in evidence, that the goods were pawned to him for money, and that it is not paid, but must pleade it; but he may give in evidence a gift from the plaintife, for that proveth he detaineth not the plaintiff's goods." Coke upon Littleton, 283 a.

### RICHARDS v. FRANKUM.

IN THE EXCHEQUER. 1840.

REPORTED 6 MEESON & WELSBY, 420.

The only issue on *non detinet* is upon the fact of the detainer.

This was an action of detinue for a promissory note. The defendant pleaded, first, non detinet; secondly, that the plaintiff was not possessed of the note; thirdly, that before the commencement of the suit, the plaintiff for a good and valuable consideration, assigned and delivered the said promissory note to one John Granger, to be by him held as and for his own note; and that the said John Granger, before the commencement of this suit, delivered the said note to the defendant, to be by him held for and on the behalf and for the use and benefit of the said John Granger; and that the defendant, as the servant and by the command of the said John Granger, detained and still detains the said promissory note, as he lawfully might for the causes aforesaid.

The replication traversed the assignment and delivery of the

<sup>1</sup> But see *Johnson v. Dodgson*, 2 M. & W. 653.

<sup>2</sup> See *Cotton v. Browne*, 3 A. & E. 312, where it was held that probable cause ought not to be specially pleaded to a declaration (since the new rules) for maliciously indicting. See also *Delegal v. Highley*, 3 New Ca. 950; and *Drummond v. Pigon*, 2 New Ca. 114, there cited.

note by the plaintiff to Granger, and the delivery by him to the defendant.

At the trial before Gurney, B., at the last assizes for the county of Oxford, the jury found a verdict for the defendant on the second and third issues; the learned judge giving the defendant leave to move to enter a verdict on the issue on the plea of *non detinet* also, if the court should be of opinion that the matters of defence so found in his favor were evidence in support of that issue.

Ludlow, Serjt., now moved accordingly. The jury, by finding on the second and third issues for the defendant, have found that the promissory note was not the property of the plaintiff, and so established the plea of *non detinet*, which puts in issue the wrongful holding and detaining of the note by the defendant. It is evident from the use of the words, "which he unjustly detains," in the original writ and declaration, that the unjust detention is the gravamen of the complaint, and that is therefore put in issue by the plea of *non detinet*, notwithstanding the New Rules. Whatever may be the effect of the New Rules as to pleading specially matter of excuse, the unjust detention is the gravamen of the charge in the declaration; and as that is a material allegation in it, and is traversed by the plea, and the finding of the jury on the other issues establishes that there was no unjust detention, the verdict ought therefore to be entered for the defendant.

Lord Abinger, C. B. There is no ground whatever for this motion. It is true that a party who brings an action of detinue brings it for the unjust detention of his property; but where the detention is justified, the matter must be set out on the record. The only issue on *non detinet* is upon the fact of the detainer. If the party has a lawful excuse for the detainer, he must plead it.

Parke, B. There is no ground for this application. Under the plea of *non detinet* a defendant might, at common law, prove that the goods were not the property of the plaintiff; but if he had a lawful excuse for the detention, as if the goods were pawned or pledged to him for money which was not repaid, he was bound to plead it. Co. Lit. 283 a. Lord Coke there says, "In detinue, the defendant pleadeth *non detinet*; he cannot give in evidence that the goods were pawned to him for money, and that he is not paid, but he must plead it; but he may give in evidence a gift from the plaintiff for that proveth that he detaineth not the plaintiff's goods." But it is perfectly clear that, since the New Rules, the defendant cannot give in evidence, under the plea of *non detinet*, that the goods were not the property of the plaintiff; so that, in any view of the case, the matters proved in support of the second

and third pleas were not evidence under the first. If the object be to show that the chattel is not the property of the plaintiff, that cannot be done under such a plea since the **New Rules**. If the ~~object be to show that the detention was lawful, and the party had a good excuse for detaining the property, then, according to the authority of Lord Coke, such a defence ought to be pleaded, even at common law.~~ Under the plea of *non detinet*, the fact of detention is alone in issue.

Alderson, B. In an action of trover, the plea of not guilty puts in issue the mere fact of the conversion, and so under the issue of *non detinet* the fact of the detention is alone in issue.

Rolfe, B., concurred.

Rule refused.

### LANE v. TEWSON.

IN THE QUEEN'S BENCH. 1841.

REPORTED 1 GALE & DAVISON, 584.

Detinue of goods. Plea, that the said goods, etc., were not the goods of the plaintiff.

At the trial before Parke, B., at the last assizes for the county of Lincoln, the defendant contended that he had a lien upon the subject of the action for his charges as an auctioneer. It was objected, on the part of the plaintiff, that this defence was not admissible under the plea. The learned Baron reserved leave to the plaintiff to move to enter a verdict for him on this objection, if the opinion of the jury should be adverse upon the question, which he left to them, of the fact of the lien. The jury having found a verdict for the defendant,

Balguy<sup>1</sup> now moved to enter a verdict for the plaintiff, pursuant to leave reserved. He cited *Richards v. Frankum* as an authority that in detinue a lien must be specially pleaded.

*Cur. adv. vult.*

Lord Denman, C. J., now delivered judgment. The question in this case was, whether in detinue, under a plea denying that the goods were the plaintiff's, a lien could be set up. We think that the learned judge ruled rightly that it might. A similar point has been already decided in an action of trover.

Rule refused.

<sup>1</sup> On Friday, November 5, before Lord Denman, C. J., Williams, Coleridge, and Wightman, JJ.

PHILIPS *v.* ROBINSON.

IN THE COMMON PLEAS. 1827.

REPORTED 4 BINGHAM, 106.

Want of property in the plaintiff may be given in evidence under *non detinet*.

Detinue for deeds. The declaration alleged that the plaintiff delivered, and caused to be delivered, to the defendant certain deeds (describing them) of the said plaintiff, of great value, to wit, of the value of £1000, to be re-delivered by the defendant to the plaintiff when the defendant should be thereunto afterwards requested; yet the defendant, although requested, refused to re-deliver them, and unjustly detained them.

Second count, that the plaintiff was lawfully possessed, as of his own property, of certain other deeds (describing them), and, being so possessed, lost them, and they came to the defendant's possession by finding. Yet the defendant, knowing them to be the property of the plaintiff, had not delivered them to plaintiff, though requested, but detained them.

Pleas: 1st, *non detinet*; 2dly, that the plaintiff did not deliver the deeds to the defendant; 3dly, that the plaintiff was not lawfully possessed of the deeds, as of his own property; 4thly, that they were not the property of the plaintiff; 5thly, that defendant, as a conveyancer, had a lien on them.

At the trial before Gaselee, J., Middlesex sittings after last Michaelmas Term, it appeared that the defendant was entered as a student at one of the Inns of Court, and had taken out a certificate as a conveyancer; that the deeds in question were the title deeds of an estate belonging to the plaintiff's wife; that the plaintiff or his agent, after his marriage, had delivered them to the defendant, with instructions to prepare a conveyance of the property; that the defendant prepared the conveyance accordingly; that an attorney was employed by him to levy a fine of the property, to which the plaintiff and his wife were parties; and that a fine was levied accordingly; the uses of which were declared to such person as plaintiff's wife should appoint, and for default of appointment, to George Philips, second son of plaintiff and his wife.

The defendant detained the deeds, on the ground that his charges for preparing the conveyance had not been paid.

The learned judge directed the plaintiff to be nonsuited, with

leave to move to set the nonsuit aside and enter a verdict instead, thinking, under the above circumstances, that he had no property in the deeds at the time the action was commenced.

Best, C. J. This was an action of detinue for certain deeds; to which the defendant pleaded, first, that he did not detain them; secondly, that they were not lawfully in the possession of plaintiff; thirdly, that they were not the plaintiff's property. At the time the action commenced these deeds were not the property of the plaintiff, because, whether they were originally so or not, the plaintiff had at that time consented to a fine, by which the property in the lands to which the deeds referred had been conveyed to his second son. It is a clear principle of law, that the muniments of an estate belong to the person who has the legal interest in it; so that if the plaintiff was originally entitled to receive the deeds on request, he was not so at the time of action, for he could only be so entitled as long as the right to the property continued in him.

The case cited from Viner is decisive on the point. That case rests on a decision in the year books, in which the party delivering a deed to the bailee had originally a right to it; but his right having passed away, the court held he could not sue the bailee. No distinction has been pointed out between that case and the present; and it is perfectly consistent with good sense. Why should not the rightful owner in such a case sue at once? Why should the party who originally delivered the deed be supposed to retain a special property in it, in order to do that which the true owner might do directly? I do not agree to the position that a principal may in all cases recover property which he has delivered to his agent. Suppose a principal delivers the property of another who claims it at the hands of the agent: could the agent set up as a defence that he received the property from his principal? Certainly not. He would be answerable to the true owner, and not to the false claimant. With respect to the supposed analogy between this case and that of a landlord and tenant, it is true a tenant cannot dispute that his landlord had a title at the time of the lease, but he may show that the title has expired subsequently to the lease, *England d. Syburn v. Slade*, 4 T. R. 682. So here the defendant may admit that the plaintiff had once a title to these deeds, but insist that he parted with it before the commencement of this action. *Dixon v. Hamond* has no bearing on the present question. In that case, a ship, originally belonging to one of two partners, had been conveyed to one Hart for securing a debt; subsequently Hart conveyed her to the defendant upon his advancing to Hart the sum secured: the defendant, who was

an insurance broker, afterwards effected an insurance in the names of the two partners, charged them with the premiums, and, the ship having been lost, received the amount of the insurance as their agent, but refused to pay such money to the assignees of the two partners, alleging that he was only accountable to the representative of the single partner to whom the ship first belonged. The court would not endure so dishonest a proceeding; and Abbott, J., said, "The defendant has received the money as agent for the partnership, and he cannot now be permitted to say that he received it for the benefit of Flowerdew alone." The present defendant has not received money for two persons, and then attempted to say, "I received it only for one;" but he has received deeds under color of a title which has now passed away from the party who delivered them. Suppose the case of the conusor of a fine: the estate and muniments belong to the conusee after the levying of the fine: could the conusor, after the fine had passed, maintain trover against the attorney for not re-delivering the title deeds of the estate? When the right to the estate went, the right to the muniments went also. The present case is of the same nature, and the rule for setting aside the nonsuit must be discharged.

Park, J. In supporting this nonsuit I am not afraid of impeaching any principle of law. In order to support an action of detinue, the plaintiff must have a general or a special property in what he seeks to recover. If he has not such a property, it may be shown on the plea of non detinet. But at all events the fourth plea in this case has been clearly established. The plaintiff had no property whatever in these deeds at the time of the action: it was all gone by the operation of the fine: if so, the case in Viner is in terms the same as the present. The plaintiff here had conveyed the property to his son; and he, therefore, might have sued for the deed, although he had never been in possession of the property. Roll. Abr. Detinue. Therefore, without entering on the defendant's right to detain, it is clear the plaintiff had no right to sue.


Burrough, J. In detinue the plaintiff may recover either the specific thing detained, or the value of it. But what value could the jury find for the plaintiff in the present case? I am clearly of opinion that this was an answer to the action upon non detinet. The province of the jury in this respect cannot be supplied by a writ of inquiry. But in order to establish that the deeds are of any value to him, the plaintiff must show that he has a right to them. In Co. Lit. 283, it is laid down: "If the defendant plead non detinet, he may give in evidence a gift by the plaintiff, for

that shows he does not detain his goods." At the time of this action the plaintiff had no interest in these deeds; they were of no value to him; and, therefore, the nonsuit was right.

Gaselee, J. I had some doubts at first whether want of property in the plaintiff might be given in evidence on *non detinet*, but the passage from Lord Coke renders that point clear. If the defendant relies on a lien, that must be specially pleaded but he may give in evidence, under *non detinet*, that the plaintiff has no property in the thing sought to be recovered. The circumstance that the plaintiff delivered the deeds to the defendant will not avail him, since he himself has subsequently executed a conveyance which carries the deeds with it. Rule discharged.<sup>1</sup>

## SECTION VII.

## REPLEVIN.

 MICHAEL F. D'ARCY v. JENNIE D. STEUR.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1901.

REPORTED 179 MASSACHUSETTS, 40.

*Non cepit* does not put in issue property in the replevied goods.

Replevin for certain doors alleged to be the property of the plaintiff and detained by the defendant. Writ dated May 4, 1899.

The answer was a general denial.

In the Superior Court the case was heard without a jury by Stevens, J., who found for the defendant and assessed damages in the sum of \$1. Afterwards the defendant moved for an order for a return. The plaintiff objected on the ground that the answer being only a general denial did not set up title to the goods in the defendant or show any grounds for a return of the goods replevied, and requested the judge to rule that an order for a return should not issue. The judge refused so to rule, and granted the motion of the defendant that an order of return should issue. The plaintiff alleged exceptions.

G. J. Weller, for the plaintiff.

P. Tworoger, for the defendant.

Holmes, C. J. An answer in the form of a general denial long has been sanctioned under our practice act. *Boston Relief & Submarine Co. v. Burnett*, 1 Allen, 410. It is permissible in replevin, as in other actions, and puts in issue the plaintiff's right of posses-

<sup>1</sup> The arguments of Wilde, Serjt., for the plaintiff, and Gross and Spankie, Serjts., for the defendant, are omitted.



sion. *Spooner v. Cummings*, 151 Mass. 313. In other words it is broader than the old plea *non cepit*, and dispenses with the necessity of an avowry or cognizance in order to justify a judgment for a return. See *Bartlett v. Prickett*, 98 Mass. 521; Pub. Sts. c. 184, s. 13. The practice in many other states under statutes would seem to be more or less like ours. *Fleet v. Lockwood*, 17 Conn. 233, 243; *Holiday v. McKinrie*, 22 Fla. 153, 158; *Connor v. Comstock*, 17 Ind. 90, 92, 93; *King v. Ramsay*, 13 Ill. 619, 623; *Bates v. Buchanan*, 2 Bush, 117.

Exceptions overruled.

### CALVIN GOULD v. THOMAS BARNARD.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1807.

REPORTED 3 MASSACHUSETTS, 199.

This must be done by an avowry or consuance.

This was a writ of replevin, to which the defendant pleaded, in abatement, that, at the time of the service of the writ, it was not endorsed by any responsible person with his Christian and surname, as the law requires.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

Bliss, for the plaintiff, argued that the statute, which required writs to be endorsed by the plaintiff, related only to those writs, the forms of which were prescribed by that statute, 1784, c. 28. But he seemed to rely more on the special provision prescribed by the statute particularly relating to this process of replevin, 1789, c. 26, which requires the plaintiff to give bond to the sheriff in double the value of the goods to be replevied, conditioned, among other things, for the payment of the costs which the defendant might eventually recover in the action. This special provision, being in a statute posterior to that requiring original writs to be endorsed, has superseded the use or necessity of such endorsement in this case, even if the former statute should be understood to apply to writs of replevin, of which there is great room to doubt, as the necessity of giving bond in suing out writs of replevin, existed long before the law required writs to be endorsed for the securing to the defendant his costs.

Ashman, for the defendant, observed that the words of the statute required "all original writs issuing out of the Supreme Judicial Court, and Court of Common Pleas" to be endorsed, whether those prescribed in that statute, or in any prior or posterior

statute. The language is authoritative and binding. No argument, showing that in any particular case, there is less necessity or use in the endorsement, can avail against the plain and positive requirement of a statute. We are not bound to give reasons which induce the legislature to enact any particular law. It is enough for citizens to understand and obey it, and for courts to enforce it, when enacted. One reason, however, of this provision, and it will apply as well to writs of replevin as to any other original writs, may have been that the defendant, by the plaintiff's signature on the back of the writ, may be assured that the action was really commenced at his instance. This in many cases is quite as essential to the defendant as an assurance for a bill of costs which he may eventually recover. But suppose the whole use of the endorsement to be the assuring to the defendant his eventual costs; the legislature might think it proper, in an action so different from the usual common-law process, to give a cumulative remedy to the defendant for his costs by requiring a bond, over and beyond the endorsement of the writ.

Bliss, in reply, observed that the defendant might be equally satisfied that the suit was commenced at the plaintiff's instance by the bond given, as by the endorsement upon the writ. The statute regulating the process in replevin was not in existence until years after the statute requiring the endorsing of writs, was enacted.

Parsons, **C. J.** I do not see any benefit accruing to the defendant, from requiring writs of replevin to be endorsed. The replevin bond, which must be executed by the plaintiff, with sufficient surety or sureties, is conditioned, among other things, to pay the defendant the costs he shall recover; and to secure to him his costs, by a cumulative remedy, does not appear necessary. But the statute expressly requires all original writs to be endorsed, or they may be abated. A writ of replevin is, without question, an original writ. It must therefore be endorsed.

Writ abated.

After this decision, the defendant's counsel moved for a return. The court, after taking time to consider the motion, refused to grant it. They observed that as the defendant had neither avowed nor made conusance nor made any plea or suggestion on record to entitle him to the possession of the goods, he could not have a return, and they gave judgment only for

Costs for the defendant.<sup>1</sup>

<sup>1</sup> The opinions of Parker and Sedgwick, JJ., are omitted.

GILBERT *v.* PARKER.

IN THE QUEEN'S BENCH. 1704.

REPORTED IN 2 SALKELD, 629.

In replevin for taking cattle, the defendant made conusance that A., his master, was seised of the locus in quo, and per ejus præcept, he took them damage-feasant. Plaintiff replied, that he was seised of one-third part, and put in his cattle, absque hoc, that the said A. was sole seised. To this the defendant demurred, and judgment was given against him; for the defendant makes a conusance under his master as sole seised, when he was only tenant in common; in which case he should have pleaded according to the truth, that he was only tenant in common, etc. When the defendant pleads his master was seised in fee of the place where, etc., that must necessarily be understood that he is sole seised; and whatever is necessarily understood, intended, and implied, is traversable as much as if it were expressed; and, therefore, though a seisin in fee is only alleged generally, yet that being intended a sole seisin, the plaintiff may traverse, absque hoc, that he is sole seised; since the plaintiff makes himself tenant in common with the defendant, it had not been enough to say that he is tenant in common, without traversing the sole seisin.

HILL *v.* WRIGHT.

AT NISI PRIUS, CORAM BULLER, J. JULY, 1798.

REPORTED 2 ESPINASSE, 669.

This was an action of replevin.

The defendant, by his avowry, stated that the plaintiff held of him certain premises, the rent whereof was reserved quarterly, and then avowed for a quarter's rent in arrear to Christmas, 1797.

Plea in bar to the avowry. No rent in arrear.

The counsel for the plaintiff stated his case to be, that he held under a lease from the defendant's father, under whom the defendant claimed; which lease he had ready to produce, but in which the rent was reserved (half yearly) and not quarterly, as the defendant had avowed.

Buller, J. The plaintiff cannot go into that evidence on these pleadings.

Shepherd, Serjt., contended that it could. That the issue was,

that there was no rent in arrear on the day stated in the avowry. No rent was by law due till the days on which it was reserved and made payable; and, by the lease, those days were Michaelmas and Lady-day; so that no rent was in arrear at Christmas, on which day the defendant avowed, no rent being then due or payable.

Buller, J. *Riens en arrere* admits the title of the defendant as stated in the avowry. The holding, therefore, must be taken to be a holding reserving the rent quarterly. The plaintiff might have, by his plea in bar, denied the holding. He has not done so, but chosen to take issue only on no rent being in arrear at Christmas, 1797. Unless, therefore, he can show that he has paid the rent up to that time, the defendant must have a verdict.

The plaintiff having no evidence to that effect, the defendant had a verdict.

### DOVER v. RAWLINGS.

AT NISI PRIUS, CORAM TINDAL, C. J. FEBRUARY, 1844.

REPORTED 2 MOODY & ROBINSON, 544.

Replevin. Plea, *non cepit*, and issue thereon.

The plaintiff proved a seizure of the goods by the defendant, but failed in proving any property in them, for that at the time of the seizure they were in his (the plaintiff's) possession.

Channell, Serjt., objected that upon the issue joined it was necessary for the plaintiff to show himself in possession of the goods. The New Rules had introduced no alteration in the pleadings in replevin, and before those rules *non cepit* put the property in issue.

Tindal, C. J. I agree that the New Rules do not apply to this form of action; but I find that in Comyns's Digest a plea is given expressly denying the property, and I think that the plea of *non cepit* would not, according to the old course of pleading, put the plaintiff on proof of the possession. The plaintiff accordingly had a verdict.

### ARUNDELL v. TREVILL.

IN THE KING'S BENCH. 1672.

REPORTED SIDERFIN, 81.

In replevin brought by an executor for a mare and colt, the defendant pleaded not guilty of the taking aforesaid within six years now last past, and it was urged for the defendant that this is a good plea, because it is in effect *non cepit*. . . . But upon consultation it was resolved by the court that the plea is not good, because it

does not answer the detainer forasmuch as here the colt was not taken but sold in the pound, and one may distrain a thing lawfully and afterwards may detain it unlawfully, as when one puts it in a castle, etc., so that it cannot be replevied. Fitz. Repl. 6-21. And as for its being said that the executor may not have replevin, the law is contra. Fitz. N. B. 121 . . . for replevin affirms property and so the executor may well have this or quare impedit or ravishment of his ward.

### RECAPITULATION OF THE GENERAL ISSUE.

① "In trespass to persons, the general issue of not guilty may be properly pleaded ~~to~~ the defendant committed no assault, battery, or imprisonment, etc.; in the trespass to personal property (if) the plaintiff had ~~no~~ property in the goods; and in trespass to the real property, if he was ~~not~~ in possession of the land, etc. And *liberum tenementum*, or other evidence of title or right to the possession, may be given in evidence, under the general issue. But regularly, by the common law, matter of excuse or justification must be specially pleaded; as in trespass to persons, or justification must be specially pleaded; as in trespass to persons, *son assault demesne*; or in trespass to real property, a license that the beasts came through the plaintiff's hedge, which he ought to have repaired; or in respect of a rent-charge, common or the like. And the defendant must plead specially a release or other matter in discharge of the action. But in actions against justices, etc., and in various other cases, the defendant by act of Parliament is allowed to plead the general issue, and give the special matter in evidence.

n.B. ✓ ② "In actions upon the case the defendant, upon the general issue of not guilty, may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may offer any matter in excuse or justification of it; or he may set up a former recovery, release or satisfaction: for an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and in effect is so; and therefore such a former recovery, release, or satisfaction need not be pleaded, but may be given in evidence; since whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only. In an action for words, the truth of the words cannot be given in evidence, under the general issue of not guilty. And by the 8 & 9

Will. III. c. 27, s. 6, 'no retaking on fresh pursuit shall be given in evidence, on the trial of any issue, in any action of escape, against the marshal, etc. unless the same shall be specially pleaded; nor shall any special plea be received or allowed, unless oath be first made in writing by the defendant, and filed in the proper office, that the prisoner, for whose escape such action is brought, did escape without his consent, privity or knowledge.'

"Where the defence consists of matter of fact, and the general issue may, it ought to be pleaded; it being in such case a good cause of demurrer, that the plea amounts to the general issue. But it is observable, that in many cases, where the defence consists of matter of law, the defendant may either plead it specially, or give it in evidence under the general issue; as in *assumpsit*, (*infancy, accord and satisfaction*, or a *release*, etc. may be either pleaded, or given in evidence upon *non assumpsit*; and in debt on bond, made by a married woman, the defendant may either plead *coverture*, or give it in evidence upon *non est factum*. In these cases, from the nature of the defence, the plaintiff has an implied color of action, bad indeed in point of law, if the facts pleaded be true, but which is properly referred to the decision of the court. And where, from the nature of the defence, the plaintiff would have no implied color of action, the defendant, in some cases, is allowed to give him an express color. Thus in the common and almost only case where express color is now given, if in an action of trespass *quare clausum fregit*, the defendant plead a possessory title, under a demise from a third person, (for if he claim under the plaintiff, there is an implied color) this, without more, would amount to the general issue; for it goes to deny that the trespass was committed in the plaintiff's close: but if the defendant, after stating his own title, supposes (as is usual) that the plaintiff entered upon him, under color of a former deed of feoffment without livery, and that he re-entered, this creates a question of law, for the decision of the court; and by that means prevents the plea from amounting to the general issue; and being matter of supposal, it is not traversable.

"In trespass for taking goods if the defendant plead that A was possessed of them, as of his proper goods, and sold them in market-overt, or that B stole the goods from A and waived them within his manor, wherefore he took them, the defendant must give color; for his plea proves that no property was in the plaintiff, so he had no color of action; and the color usually given in such cases is, that the defendant bailed the goods to a stranger, who delivered them to the plaintiff, from whom the defendant took them. But

in the same cases, if the defendant plead that **A** sold the goods in market-overt, without saying that they were his own, or that B took them *de quodam ignoto*, and waived them, the plea is good without color; for it does not deny but that the property was in the plaintiff, and the defendant is not bound to show expressly in whom it was." Tidd, Practice, 597-601.

## II. PLEAS IN CONFESSION AND AVOIDANCE.

### (a) *In Justification or Excuse.*

B. says to C., "A. murdered X."

A. sues B. for slander.

The words are true. B. cannot plead *not guilty*, for he did speak the words.

B. will plead a special plea. He will, in effect, say, "I confess that I spoke the words, but I avoid their legal effect by saying that they are true."

### (b) *In Discharge.*

B. executes and delivers to A. a specialty promising to pay A. £10 at Easter.

At Easter, B. refuses to pay.

A. brings an action of debt on B.'s bond. B., however, has a release under seal from A., executed and delivered the day after the delivery of the obligation on which suit is brought.

B. cannot plead *non est factum*, for the deed sued on is his deed. B. will plead a (special plea) He will, in effect, say, "I confess the signing, sealing, and delivery of the obligation on which I am sued, but I repel its legal effect by showing to you this release under seal by A. of my debt to him."

"The quality of a plea in confession and avoidance is more peculiar [than that of a plea in denial], and demands particular attention. A plea of this description is either in justification or excuse of the matters alleged in the declaration; as, imprisonment under a magistrate's warrant, or *son assault demesne* in trespass; or it is in discharge of the cause of action by subsequent matter, as accord and satisfaction, or a release. It is observable that each of

these pleas admits the mere facts stated in the declaration, as that the defendant committed the trespass charged; that the contract was made, or the debt was incurred, etc. But the matter which they allege by way of defence defeats or avoids the legal effect of those facts, and disproves, if true, the plaintiff's right of action. . . .

"It is plain that a plea which shows some new matter in avoidance or discharge of the plaintiff's allegations is double and argumentative, if it do not admit the apparent truth of those allegations as matter of fact. There can be no occasion to adduce grounds for defeating the operation of disputed facts. The plea in avoidance must therefore give color to the plaintiff, that is, must give him credit for having an apparent or *primâ facie* right of action, independently of the matter disclosed in the plea to destroy it." Chitty, Pleading, \*552.

### RADFORD v. HARBYN.

IN THE KING'S BENCH. 1606.

REPORTED CROKE'S JAMES, 122.

#### Color defined.

Trespass, for taking and carrying away a hundred load of wood. The defendant justifies, for that J. S. was possessed of them *ut de bonis propriis*; and the plaintiff claiming them by color of a deed of gift of them afterward made, took them, and the defendant retook them.

It was thereupon demurred: Because the color given to the plaintiff is a good title for the plaintiff, and confesseth the interest in him; for color ought to be such a thing which is good color of title, and yet is not any title; as a deed of a lease for life, because it hath not the ceremony, viz. livery. So grant of a reversion without attornment is not good; but a deed of goods and chattels without other act or ceremony is good. So of color by a lease for years or letters patent, it is not good; because they make a good title in the plaintiff. — And of that opinion was all the court.

### HATTON v. MORSE.

IN THE QUEEN'S BENCH. 1702.

REPORTED 3 SALKELD, 273.

#### Kinds of color distinguished.

There is a short note of this case in 1 Salk.; but the case was thus: ss. *In assumpsit*, etc. The defendant pleaded, that true it is he did promise, but that *ante diem impetrationis balle*, he paid the money;



and upon a demurrer to this plea it was objected, that it amounted to the general issue. But per Holt, Ch. Just. This doth not amount to the general issue; for though payment may be given in evidence upon *non assumpsit* pleaded, yet it was long before that obtained; it is likewise giving color, for he says, there was a promise, but that he performed it: now there are many things which may be given in evidence under the general issue, and yet those things may be pleaded specially: as, for instance, in an action of debt the defendant may plead a release, or he may give it in evidence upon *nil debet* pleaded, so in debt for rent upon a demise, the defendant may plead an entry and eviction, before any rent became due, or he may give it in evidence upon *nil debet*.

8. There are two sorts of color, the one is express, the other implied.

9. Express, as in trespass *quare clausum fregit*, the defendant in pleading makes title under W. R. setting forth, that the plaintiff claims under a feoffment from the said W. R. by which nothing passed, but that he entered by color thereof: now here the defendant gave color of action to the plaintiff because by the feoffment he was tenant at will, and entered, and by virtue of his possession he may maintain an action against every one, but not against him who hath a right; so likewise in trespass *quare clausum fregit*, if the defendant pleads, that the plaintiff was seised, etc., and made a lease to him for years, there is no occasion to give express color, because the defendant allows, that the plaintiff hath the reversion, which is color enough.<sup>1</sup>

### HALLET v. BYRT.

IN THE KING'S BENCH. 1698.

REPORTED 5 MODERN, 252.

In trespass, possession is a good color.

Trespass against Byrt and Hallet, for taking and detaining the plaintiff's cattle.

The defendants plead not guilty as to all, but the taking three cows: and as to that, they say, that the hundred of Beaminster is an ancient hundred, whereof the Bishop of Salisbury was seised in fee, and that he and his predecessors have time out of mind kept a court

<sup>1</sup> Per Holt, Chief Justice, in *Ashmead v. Ranger*, 1 Ld. Raym. 551: "If the plaintiff replies, the defect of color is waived; but upon a general demurrer advantage might have been taken of it."

there from three weeks to three weeks, for the trial of personal actions, under the value of forty shillings, and so prescribes to grant replevin either by himself or steward in court, or out of court, upon complaint made to them of the taking, and unjustly detaining any cattle within the said hundred: that the Bishop afterwards conveyed this hundred to one Whitlock for three lives, by virtue whereof he was seised; that the plaintiff and one Rodbart took and impounded the cows within the said hundred, being the cows of a stranger, who made complaint thereof to the steward, and he directed his warrant to the bailiff of the hundred, and to the said Hallet, commanding them to replevy the cattle; by virtue whereof, Hallet, and the other defendant Byrt, in *auxilium ejus*, did take and deliver them to the owner; and traversed that they were guilty of the taking at any time before the warrant, or after the return, *aliter vel aliter modo*.

The plaintiff demurred, and showed for cause that this plea amounted to the general issue.

But it was argued, to maintain it, that there was sufficient color to make this plea good, for in an action of trespass, possession is a good color; and the defendant may have the benefit of such plea, when the substance of it is by way of excuse, though he might have pleaded the general issue.

*E contra*.<sup>1</sup>

But the court did not speak to this point.<sup>2</sup>

“Where the defence consists of matter of fact, merely amounting to a denial of such allegations in the declaration as the plaintiff would on the general issue be bound to prove in support of his case, a special plea is bad, as unnecessary and amounting to the general issue: first, because such special plea, if considered as a traverse, tends to needless prolixity and expense, and is an argumentative denial and a departure from the prescribed forms of pleading the general issue; and, secondly, if viewed as a plea in confession and avoidance, it does not give color or a plausible ground of action to the plaintiff.

“Thus, in assumpsit or debt on a simple contract, a plea of matter which shows that no such contract was in fact made, is bad; as a plea in an action for the price of a horse, ‘that the defendant did not buy the horse.’” Chitty, Pleading, \*552.

<sup>1</sup> The argument *e contra* is omitted.

<sup>2</sup> The plaintiff had judgment on another ground, the plea being naught, for that the hundred courts could not legally hold pleas in replevin.

GOULD *v.* LASBURY.

IN THE EXCHEQUER. 1834.

REPORTED 1 CROMPTON, MEESON, &amp; ROSCOE, 254.

The confession, in a plea of confession and avoidance, must be unqualified.

Declaration in debt on simple contract. Plea, that the defendant was discharged, under the Insolvent Debtors' Act, "from the debts and causes of action, if any, and each and every of them." Special demurrer, assigning for cause that the said plea did not confess and avoid the cause of action, etc.; and that the plea neither set out the charge specially nor was pleaded generally, in the form given by the statute.

1511 Erle, in support of the demurrer. There are two defects in this plea: First, the well-known rule of law, that a plea must either traverse, or confess and avoid, is violated. A plea like this, of confession and avoidance, must admit and confess the matter stated in the declaration distinctly. Taylor *v.* Cole, 3 Term Rep. 292, is a decisive authority on this point. So in Griffiths *v.* Eyles, 1 Bos. & Pull. 413, where a hypothetical replication was attempted, Chief Justice Eyre said that the party could not plead hypothetically. The admission here is most clearly hypothetical. Secondly, if the statute gives a form of pleading, the party must either conform to that form, or must plead in the more special form, which the usual rules of law would present. Sheen *v.* Garrett, 6 Bing. 686. Here the plea is general, that the party was discharged; but it does not follow the form given by the act, which contains no such words as "if any."

Kelly, *contra*. The general rule, that a party must traverse, or confess and avoid, every material allegation, is not disputed; the question is, whether this plea does not substantially confess the matter in the declaration. Similar expressions are used in numerous instances and are to be found in all the forms in the books of pleading. In pleas of the Statute of Limitations, of infancy, of bankruptcy, of the Insolvent Debtors' Act, and of set-off, it is usual to use words of this description. The expressions, "if any such there be," or "the supposed," are common in all these forms. The usual words were "the supposed" causes of action, which is quite as hypothetical an expression as "if any." In a case of Gale *v.* Capern, 1 Ad. & Ell. 102, in the King's Bench, which is not yet reported, the declaration was for goods sold. There was a plea of set-off on a bill of exchange; the replication alleged that the "sup-

posed" cause of set-off did not accrue within six years, upon which issue was taken. It was held at the trial that the handwriting of the acceptor and indorsers was admitted, and need not be proved. On motion for a new trial, it was contended that the word "supposed" prevented any such admission; but the court held that the word "supposed" did not at all alter the effect of the replication. [Alderson, B. You would contend that the expression "supposed" is no more than a protestation.] Exactly so. The object of the rule of pleading is not that there should be an absolute, unqualified, and express confession, but that there should be what may amount to a confession in the particular suit. There must be such a confession as will relieve the other party from the necessity of proving it. [Lord Lyndhurst, C. B. The word "supposed" may perhaps be considered as no more than "alleged." I find the word "supposed" in several of the forms you have adverted to, but not the words "if any such there be."] In a plea in abatement for nonjoinder, the words, "if any such there be," are invariably used. The defendant says sufficient if he admits for the purpose of the particular action, though he protests for the purpose of any other. The forms alluded to show that it is not necessary that the confession should be in the unqualified form contended for on the other side. If the plaintiff had replied generally, he would not have been bound to prove the cause of action at the trial. The present form is taken from a late edition of an approved book of pleading.

Erle, in reply. The plea does not amount to an unqualified admission. The admission is qualified and hypothetical. In *Taylor v. Cole*, Buller, J., said, "It is a rule in pleading that the party justifying must show and admit the fact." The illustration of the plea in abatement is unfortunate for the defendant. It is remarkable that the plea in abatement is the only instance in which the words, "if any such there be," are used. The word "supposed" is nothing more than "alleged." Now, when the case of a plea in abatement is considered, the exception in that case serves rather to strengthen the general rule. The rule as to confessing and avoiding is only applicable to a plea in bar. A plea in abatement need not confess and avoid; the defendant is not bound to traverse or confess all matters alleged; he has at that stage nothing to do but to show that the plaintiff may have a better writ, and the judgment is not to be that the plaintiff is to recover or not on the allegations upon the record, but that the writ be quashed, or that the defendant answer over. It is singular that it is only in the case of such a plea that the words "if any" appear to be usually adopted. The argument from the doctrine of protestations is equally inapplicable.

If a person has to answer when he either is bound or chooses to answer one matter only, there are cases where he may take the other matters by protestation; but it is different as to the matter which a party assumes to be answering. Besides, the facts taken by protestation are admitted in the action by a well-known rule of law; but here the admission is coupled with a qualification. In *Gale v. Capern*, the only question was as to what was the issue to be tried. The handwriting was not in issue, but that had nothing to do with the question of the form of pleading. If it could be matter of doubt on the trial, we have a right to say on special demurrer that it is not well pleaded. [Alderson, B. In *Taylor v. Cole* and *Griffiths v. Eyles* the fact was in the peculiar knowledge of the party pleading.] So, here, the defendant must have known whether he was indebted or not.

Lord Lyndhurst, C. B. It is difficult to distinguish the expression "supposed" from that of "if any." As there has been a decision in which a construction is said to have been put on the word "supposed," we will confer with the judges of the other courts.

*Cur. adv. vult.*

On a subsequent day Lord Lyndhurst, C. B., said: In the case of *Gould v. Lasbury*, there was a plea of a discharge under the Insolvent Debtors' Act, which was contended to be bad, because it did not directly confess and avoid the matters alleged in the declaration, but merely stated the discharge from the said causes of action, "if any." A similar point having been argued in the King's Bench, we have conferred with the judges of that court on the subject, and we concur with them in thinking that the words vitiate the plea. The demurrer, therefore, must be allowed.

Judgment for the plaintiff.<sup>1</sup>

<sup>1</sup> *Griffiths v. Eyles*, 1 B. & P. 413; *Margetts v. Bays*, 4 A. & E. 489; *Martin v. Swearingen*, 17 Iowa, 346; *Anson v. Dwight*, 18 Iowa, 241; *Morgan v. Ins. Co.*, 37 Iowa, 359; *Conger v. Johnston*, 2 Den. 96; *Comm. Bank v. Sparrow*, 2 Den. 97; *Hart v. Meeker*, 1 Sandf. 623; *Hamilton v. Hough*, 13 How. Pr. 14, *accord*. See *McCormick v. Pickering*, 4 Comst. 276. — *Ed.*

## IN EXCUSE.

(a) *Special Assumpsit.*BRIND *v.* DALE.

IN THE EXCHEQUER, TRINITY TERM. 1837.

REPORTED 2 MEESON &amp; WELSBY, 775.

A plea averring matter which qualifies the contract declared on amounts to the general issue.

Assumpsit. The declaration stated that the defendant, before and at the time of the making of the promise thereafter mentioned, was a common carrier of goods in and by a certain cart, from divers places to divers other places ; and thereupon the plaintiff theretofore, to wit, on the 14th November, 1836, at the request of the defendant, caused to be delivered to him, as such carrier, a certain trunk containing certain goods and chattels therein particularly described, to be taken care of and safely and securely carried and conveyed by the defendant, as such carrier, in and by the said cart, from a place called Nicholson's Wharf to a place called Brook's Wharf, and there to be safely and securely delivered by the defendant for the plaintiff. The declaration then alleged in the usual terms a promise by the defendant safely to carry and convey and deliver the goods, and a breach in not carrying safely whereby the trunk and its contents were lost.

Fifth plea, that at the said time when he, the defendant, received the said goods and chattels from the plaintiff, and at the time the said supposed promise of the defendant was made, an express condition and agreement was then made and entered into between the plaintiff and the defendant ; that is to say, that whilst the defendant carried and conveyed the said trunk with the said goods and chattels in and by his said cart from the said place called Nicholson's Wharf to the said place called Brook's Wharf, he the said plaintiff would accompany and follow the said cart of the defendant, and watch and protect the said goods and chattels from being stolen or lost out of the said cart ; but that the plaintiff, contrary to the said condition and agreement in that behalf, wholly neglected and refused to accompany and follow the said cart, or to watch and protect the said goods and chattels from being stolen or lost from the said cart ; by reason whereof, and not by reason of any negligence, carelessness, or improper conduct in the defendant or his servant, the said goods and chattels were lost. Verification.

Special demurrer, assigning for causes, first, that the said plea does

not properly confess the promise in the declaration ; secondly, that the matter of defence in the said plea amounts to the plea of non-assumpsit, and ought to have been so pleaded. The marginal note stated that the plaintiff would also contend that the plea was bad in substance, inasmuch as the engagement entered into by the plaintiff, without consideration, could not limit the defendant's liability as a common carrier.

Barstow, in support of the demurrer. The defendant is in this dilemma, — either the plea amounts to the general issue, or it is no answer to the action. It sets up a contract different from and incompatible with that alleged in the declaration. The court then called upon

W. H. Watson, to support the plea. The declaration alleges the defendant to be a common carrier, and avers a delivery to him as such. Though that allegation be true, there may yet be a special agreement, by way of qualification of his general liability. [Parke, B. The declaration says, the goods were delivered to be taken care of by the defendant ; the plea says they were not.] The defendant says, in substance, "I admit I received the goods as a common carrier, but I made also a collateral agreement that the plaintiff should watch them." The defendant would have his remedy over against the plaintiff for not watching the goods pursuant to his agreement ; and so, to avoid circuity of action, it is set up in the plea in discharge of the plaintiff's cause of action. [Parke, B. The effect of the agreement is to protect the carrier from theft or loss ; that qualifies the contract. ] If the court is of opinion that it amounts to a qualification of the plaintiff's contract, not to a substantial and collateral contract, the plea certainly cannot be sustained.

*Per curiam.*

Judgment for the plaintiff.

### SMART v. HYDE.

IN THE EXCHEQUER, TRINITY TERM. 1841.

REPORTED 8 MEESON & WELSBY, 723.

For it is a denial of the contract declared on.

Assumpsit. The declaration stated that, in consideration that the plaintiff would buy of the defendant a mare at a certain price, the defendant promised the plaintiff that the mare was sound, and averred as a breach that the mare was not sound.

The defendant pleaded, amongst other pleas, thirdly, that, before the promise, he the defendant sent the mare to a certain place for

the sale of horses, called Lucas's Repository, there to be sold according to certain rules, which were in the words following: "Terms of private sale. A warranty of soundness, when given at this repository, will remain in force until twelve o'clock at noon of the day next after the day of sale, when it will be complete, and the responsibility of the seller will terminate, unless in the mean time a notice to the contrary, accompanied by the certificate of a veterinary surgeon, be delivered at the office of R. Lucas; such certificate to set forth the cause, nature, or description of any alleged unsoundness;" of all which the plaintiff, before and at the time of making the said promise, had notice. The plea then averred that the sale was a private sale, and that the promise, and the buying from the defendant, took place subject to the said rules and regulations touching the private sale of horses, and that the same were agreed to by the parties; and although the time limited by the said rules for the delivery of the notice and certificate had elapsed before the commencement of this suit, yet no such notice or certificate had been delivered by or for the plaintiff, at the office of the said R. Lucas. Verification.

Special demurrer, assigning for causes, that the plea amounted to the general issue; that whereas the plaintiff had declared on an absolute and unqualified undertaking that the mare was sound, the defendant had not confessed and avoided the same, nor had directly denied such promise, but had stated matters for the purpose of qualifying such promise, and of showing that the warranty remained in force only until twelve at noon of the day after the sale, and was a warranty against such unsoundness only as the plaintiff might discover within such period.

Crompton, in support of the demurrer. The plea attempts to show that there was a qualification of the warranty, and that the contract was different from that declared upon, and it therefore amounts to the general issue. [Parke, B. The warranty, as set out in the declaration, is an absolute one. The plea admits the statement in the declaration, but sets out new facts, for the purpose of showing that there was no breach of contract; it does not deny a sale of the horse, or the warranty that the horse was sound.] On the warranty stated in the plea, there is to be no responsibility at all in certain cases, and that is a qualification which might have been given in evidence under the general issue. In *Bywater v. Richardson*, 1 Ad. & Ell. 508; 3 Nev. & M. 748, where there was a similar condition, Littledale, J., treats it as a qualified warranty. [Parke, B. You say that the contract which would have to be proved would vary from that stated in the declaration, and there-



fore might be given in evidence under the general issue.] Yes. In *Latham v. Rutley*, B. & Cr. 20 ; 3 D. & R. 211, the declaration stated a contract to carry goods from London, and deliver them safely at Dover ; the contract proved was to carry and deliver safely, fire and robbery excepted ; and it was held to be a variance. Here the contract stated in the declaration is, that the defendant will be generally answerable for the unsoundness of the mare ; but the contract stated in the plea is, that he will not be answerable at all, if the act be not done within a given time. In *Latham v. Rutley*, Abbott, C. J., says, "The result of all the cases upon the subject is, that if the carrier only limits his responsibility, that need not be noticed in pleading ; but if a stipulation be made that, under certain circumstances, he shall not be liable at all, that must be stated." [Parke, B. The contract there stated was a contract to carry the goods safely, not a limited contract, if the goods were not affected by fire or robbery. Here the contract alleged is, that the defendant undertook that the mare was sound : that he is to be responsible if unsound is merely an inference from that.] Where a condition merely limits the amount of damages, it is true that it need not be stated in the declaration : *Clarke v. Gray*, 6 East, 564 ; but where the contract, as in this case, is qualified by conditions, it is a variance to state it as absolute in its terms. In *Howell v. Richards*, 11 East, 633, it was held, that, if a covenant for quiet enjoyment be restrained by any qualifying context, it must be stated, and if not, that the defendant might take advantage of it under the plea of the general issue, as being an untrue statement of the deed in substance and effect. *Tempany v. Burnaud*, 4 Campb. 20, and *Browne v. Knill*, 2 Brod. & B. 395, are authorities to the same effect. In *Whittaker v. Mason*, 2 Bing. N. C. 359 ; 2 Scott, 567, the plaintiff declared upon a contract of sale of certain books ; the defendant pleaded that the books were sold subject and according to the usage and course of dealing observed among booksellers in London ; to which the plaintiffs replied *de injuria* ; and on demurrer to the replication, it was held that the plea in effect amounted to the general issue. [Parke, B. There the plea set up a different contract ; here the plea does not alter the consideration or the promise.] The omission to state the qualification entirely alters the legal effect of the contract. The case is distinguishable from *Syms v. Chaplin*, 5 Ad. & Ell. 634 ; 1 Nev. & P. 129, which was an action against a coach proprietor for the loss of a parcel above the value of £10 ; for the omission to declare the value of the parcel did not qualify the nature of the contract, but was a matter which avoided it, and therefore required to be specially pleaded. The general rule is,

that contracts are entire, and it is only an exception to that rule, that where a part of the contract does not affect the rest which is declared upon, such part need not be stated.

J. Henderson, *contra*. The plea is good. The truth of the facts stated in it is consistent with the contract alleged in the declaration. The defendant says, True it is I promised that the horse was sound, and it turned out to be unsound, but there were collateral circumstances which prevented your right to sue from arising. Where, indeed, the plea discloses a contract different from that alleged in the declaration, it is bad, as amounting to the general issue. The cases which have arisen since the new rules on *indebitatus assumpsit* show that where, if the plea be true, the declaration is not, in that case the plea is open to demurrer, as amounting to the general issue. In Latham v. Rutley, the promise alleged was absolute, but the contract proved was a qualified one, and therefore did not support the promise declared on. But where there is an absolute promise, and the defence is that its efficacy has been destroyed by matters occurring subsequently, those matters must be specially pleaded. In *Hotham v. The East India Company*, 1 T. R. 638, where there was a covenant in a charter-party, that no claim for short tonnage should be allowed, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights; it was held, that this not being a condition precedent to the plaintiff's right to recover for short tonnage, but a matter of defence to be taken advantage of by the defendants, the not averring performance was no ground for arresting the judgment. That case resembles the present. It was not necessary for the plaintiff to aver performance of the condition annexed to this warranty; it is sufficient for him to allege the contract and breach. The fact on which the defendant relies is collateral to the original contract, and therefore ought to be pleaded specially.

Crompton, in reply. The contract as set out in the plea affects the consideration stated in the declaration, for the plaintiff is bound to give notice of the unsoundness before a specified time, in order to render it an absolute warranty. *Hotham v. The East India Company* turns on the distinction between covenant and assumpsit, and on the rule which is peculiar to the former, that a party need not set out more covenants than those of the breach of which he complains; but that is not applicable to assumpsit. The condition, which it is not requisite to state, is such a one as does not qualify the original promise. The narrow point is, does this plea affect the liability which the defendant is under, upon the

contract alleged in the declaration? It is submitted that it does; it shows that he is not absolutely bound; whereas, on the contract as stated in the declaration, he is so. *Latham v. Rutley* is in point. [Parke, B. In that case there was no promise to carry safely at all events; here there was an absolute warranty of soundness.]

Parke, B. I am of opinion that the plea is a good plea, and that the defendant is entitled to judgment. The declaration states, that, in consideration that the plaintiff would buy a mare of the defendant, the defendant promised that she was sound. Then there is a special plea, which states, that the mare was sent to a repository for the sale of horses, to be sold according to certain rules, which provided that the warranty of soundness was to remain in force up to a certain time only, unless notice of the unsoundness was in the mean time given; and it goes on to aver that the sale took place subject to those rules, and that no notice was delivered within the time specified. It appears to me that such plea is not bad as amounting to the general issue. It admits the contract and the promise, but shows it to have been made subject to certain rules which have not been complied with. What is the meaning of those terms? It seems to me to be this, that the warranty shall be deemed to have been complied with, unless a notice and certificate shall be delivered to the vendor before twelve o'clock at noon of the day next after the day of the sale. That is not a denial of the warranty, but a mere condition annexed to it. No notice and certificate were delivered, and therefore the contract is to be considered as complied with. If the matter relating to the notice had been by way of proviso upon the warranty, it might perhaps have been necessary to state it in the declaration; but upon that point I give no opinion. It is enough to say that every word of this plea is consistent with the contract stated in the declaration.

Alderson, B. The meaning of the plea is, that there was a sort of conventional warranty of soundness, and that the warranty was to be considered as complied with, unless a notice and certificate of unsoundness were given within a certain time, which was not done. That is not a denial of the contract, as alleged in the declaration.

Gurney, B., and Rolfe, B., concurred.

Judgment for the defendant.<sup>1</sup>

<sup>1</sup> See *Clarke v. Gray*, 6 East, 564; *Sharland v. Leifchild*, 4 C. B. 533; *Weedon v. Woodbridge*, 13 Q. B. 462. — Ed.

LYALL *v.* HIGGINS.

IN THE QUEEN'S BENCH. APRIL, 1843.

REPORTED 4 QUEEN'S BENCH REPORTS, 528.

Hence, where the matter pleaded turns on a different mode of interpreting the contract, non-assumpsit is the proper plea.

Assumpsit. The declaration (first count) stated that plaintiffs, at the time of the making of the promise after mentioned, viz., on, etc., had engaged one Alexander Christie to act in the capacity of collecting clerk to them, the said plaintiffs, but were desirous of having, and required, security for the correctness of the pecuniary transactions of the said A. C. as such collecting clerk with plaintiffs previously to employing A. C. in the capacity aforesaid, whereof defendant then had notice; and thereupon afterwards, viz., on, etc., in consideration that plaintiffs, at the request of defendant and of one William Sands, would employ A. C. as such collecting clerk to plaintiffs as aforesaid, defendant and W. S. then guaranteed to plaintiffs the correctness of the pecuniary transactions of the said A. C. with plaintiffs, as such collecting clerk to plaintiffs as aforesaid, to the amount of £500, in manner following: that is to say, defendant then undertook and promised plaintiffs to be security to them to the amount of £250. And the said W. Sands, etc. (the like undertaking by Sands). Averment that plaintiffs, relying on the guarantee, etc., did thereupon, to wit, on, etc., employ A. C. as such collecting clerk to plaintiffs as aforesaid, and A. C. remained and continued in their employment as such collecting clerk for a long space, etc., viz., two years then next following; that, while A. C. so remained and continued, etc., he, A. C., as such collecting clerk, collected and received from divers persons divers debts and sums of money for and on account of plaintiffs and as their moneys, to a large amount, viz., to the amount of £20,000; yet A. C. did not correctly, honestly, and faithfully account for or pay the said moneys to plaintiffs, but, on the contrary, whilst he was such collecting clerk to plaintiffs as aforesaid, wrongfully converted and disposed of a great part, to wit, £500, part of the said moneys so by him collected and received as such collecting clerk to plaintiffs as aforesaid, to his own use; and thereby the pecuniary transactions of A. C. with plaintiffs, as such collecting clerk as aforesaid, became and were incorrect and deficient to that amount; of all which, etc.: notice to defendant, on, etc., and request to him by plaintiffs to pay them the £250. Breach, non-payment.

Plea 2. That, before defendant made the promise in the first count mentioned, and before plaintiffs desired or required security for the correctness, etc., as in that count mentioned, viz., on, etc., plaintiffs and A. C. had agreed together that plaintiffs should employ A. C., and that he should serve them, in the said capacity of collecting clerk to the plaintiffs as in the first count mentioned, for certain commission and reward to A. C. in that behalf; which agreement was in full force and effect, unexpired and undetermined, at the said time of making the defendant's promise in that count mentioned, and also at and during the period and times therein mentioned during which A. C. remained and continued in the employ of plaintiffs as such collecting clerk to them as aforesaid, as in the said first count mentioned. And that plaintiffs did not desire or require security for the correctness of the pecuniary transactions of the said A. C. as such collecting clerk as aforesaid, nor did defendant promise as in the said count mentioned, until after plaintiffs and A. C. had completely made and concluded the said agreement between them above mentioned. Verification.<sup>1</sup>

Special demurrer.

Bain, for the plaintiffs. The second plea does not confess and avoid, and amounts, at most, to an argumentative denial of the consideration.

Erle, *contra*. The second plea is good: it supplies the fact, not disclosed by the declaration, that the plaintiffs had agreed to employ Christie before they desired security from the defendant; and their doing what they were already bound to do was no consideration for the defendant's promise. *Stilk v. Meyrick*, 2 Camp. 317; s. c. 6 Esp. N. P. C. 129. See *England v. Davidson*, 11 A. & E. 856; *Jones v. Waite*, 5 New Ca. 341, judgments of Patteson, J.,<sup>2</sup> Lord Abinger,<sup>3</sup> and Lord Denman, C. J.<sup>4</sup> [Lord Denman, C. J. Your plea introduces a different agreement between the plaintiffs and defendant from that stated in the declaration. Ought that to be specially pleaded?] The plea only avoids the contract declared on. It alleges that such a contract was in fact made, but the plaintiffs were bound already. [Patteson, J. You do not deny the promise, or the fact stated as the consideration, but contend that you now find the agreement to have been *nudum pactum*; that, although the plaintiffs professed that they would employ Christie at the defendant's request, they did not do it on his request, being already bound.]

Bain, in reply.

<sup>1</sup> Only so much of the case is given as relates to the second plea. — Ed.

<sup>2</sup> Page 351.

<sup>3</sup> Page 356.

<sup>4</sup> Pages 358, 359.

Lord Denman, C. J. I am of opinion that the plaintiffs are entitled to judgment on the second plea. It sets up a different consideration from that which the declaration alleges; and the matter might have been given in evidence on non-assumpsit. It is not a confession, but adds something to the statement in the declaration, which makes a different contract.

Patteson, J. The second plea is a denial of the alleged consideration, namely, that the plaintiffs, at the defendant's request, would employ Christie. It is now settled that the proper mode of traversing a consideration is by plea of non-assumpsit. It has been suggested that the plaintiffs might have previously engaged Christie, and yet that their promise to employ him in future might have been at the defendant's request. But, if it turns out on the pleading that they did not agree to employ Christie at the defendant's request, but had so agreed before it was made, that is a denial of his being employed at the request of the defendant. The consideration, therefore, is denied; and the plea should have been non-assumpsit.

Williams, J. The second plea turns only on a different mode of interpreting the contract from that adopted in the declaration. The plea should have been non-assumpsit, and the defence under it would have been variance.

Judgment for plaintiffs on the second plea.<sup>1</sup>

## SIEVEKING AND ANOTHER *v.* DUTTON.

IN THE COMMON PLEAS, 1846.

REPORTED '3 COMMON BENCH REPORTS, 331.

Incompatibility between the contract declared on and that pleaded is the test.

**Assumpsit.** The first count of the declaration stated that the plaintiffs, at the request of the defendant, agreed to supply the defendant, and the defendant ordered of the plaintiffs, divers large quantities of wool, to be purchased by him upon certain terms, that is to say, etc., that in consideration thereof, and that the plaintiffs, at the like request of the defendant, then promised the defendant to deliver the said quantities of goods to the defendant, according to the said contract, the defendant then promised the plaintiffs to accept the said goods, and to pay for the same according to the

<sup>1</sup> Sutherland *v.* Pratt, 11 M. & W. 296; Raikes *v.* Todd, 8 A. & E. 854; Wade *v.* Simeon, 2 C. B. 548; Breech *v.* White, 12 A. & E. 670; Weedon *v.* Woodbridge, 13 Q. B. 481, *accord*; Passenger *v.* Brookes, 1 B. N. C. 587, *contra*. — ED.

terms of the said contract. Averment, that the plaintiffs had always been ready and willing, and afterwards, to wit, on, etc., tendered and offered to deliver the said goods to the defendant, according to the terms of the said contract, etc. Breach, that the defendant refused to accept them.

Plea, that, at the time of the defendant's ordering the said quantities of wool, and making the said promise, as in the first count of the declaration alleged, the plaintiffs produced and showed to the defendant a certain sample of the said wool, and then promised the defendant to deliver the said quantities of wool to the defendant, and that the whole of the said quantities of wool were equal in quality and description to the said sample; that the defendant then ordered the said quantities of wool, and made the said promise, as in the said first count mentioned, on the faith and terms, and in consideration of the said promise of the plaintiffs, and not otherwise; but that the said quantities of wool, at the time when they were so offered and tendered for delivery by the plaintiffs as in the said first count mentioned, were not equal in quality and description to the said sample, but, on the contrary thereof, the same were of a very inferior and bad and indifferent quality and description, and of much less value, and of no use or value to the defendant; whereupon and wherefore the defendant then refused to accept the said wool, or pay for the same; as he lawfully might, etc. Verification.

To this plea the plaintiffs demurred specially, on the ground, amongst others, that it amounted to non-assumpsit.

Dowling, Serjt., in support of the demurrer. The declaration alleges an absolute contract on the part of the defendant to receive the wool, without any condition as to quality, or any specific description. The plea alleges that the contract was for a sale of wool, with a warranty that the bulk was equal to sample: that introduces a qualification into the contract, and amounts to a mere denial of the contract declared on. Morgan v. Pebrer, 3 N. C. 457; 4 Scott, 230; Nash v. Breeze, 11 M. & W. 352; Heath v. Durant, 12 M. & W. 438.

Channell, Serjt., *contra*. Had this been pleaded to a count in *indebitatus assumpsit* for goods sold and delivered, or goods bargained and sold, the plea would undoubtedly have been open to the objection suggested. But the difficulty here arises from the new rules, which provide that the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matter of fact from which the contract or promise alleged may be implied in law. This plea does not deny the ex-

press contract alleged in the declaration; on the contrary, it admits it; and it seeks to justify the refusal to accept the wool, by showing that it differed in quality from that which the plaintiffs contracted to deliver. [Maule, J. The contract stated in the declaration is for the delivery of wool of a merchantable quality. Tindal, C. J. Upon non-assumpsit the plaintiffs would be non-suited, if they proved a contract other than that alleged. Cresswell, J., referred to *Parker v. Palmer*, 4 B. & Ald. 387. Maule, J. If issue were taken on the tender, the plaintiffs would fail unless they proved a tender of wool of the quality and description ordered.] The plea, at all events, complies with the spirit of the new rules. [Maule, J. The defendant should certainly be allowed to plead this defence, if it is not open to him under non-assumpsit.]

Dowling, Serjt., in reply. The plea in question clearly amounts to no more than a denial of the contract alleged in the declaration. [Tindal, C. J. The contract set up by the plea is not necessarily incompatible with that stated in the declaration.] It is difficult to see how the two could coexist. [Maule, J., referred to *Street v. Blay*, 2 B. & Ad. 456.]

The court, after some deliberation, were about to pronounce judgment in favor of the plea, when Dowling, Serjt., prayed leave to withdraw the demurrer; which was granted, upon the usual terms.

Rule accordingly.<sup>1</sup>

(b) *General Assumpsit.*

HAYSELDEN v. STAFF.

IN THE KING'S BENCH. 1836.

REPORTED 5 ADOLPHUS & ELLIS, 153.

Pleas amounting to the general issue and pleas disclosing matter admissible under the general issue distinguished.

*Indebitatus assumpsit* for (among other considerations) the price and value of work done, and materials provided for the same; promise to pay on request.

Plea (among others) as to non-payment of £1 0s. 9d., parcel of the above, that the said work and materials were work done and materials provided for the same by the plaintiff for the defendant in and about the endeavoring to prevent a certain chimney from smoking, and upon the terms, agreement, and understanding that

<sup>1</sup> See *Parker v. Palmer*, 4 B. & Al. 387; *Sharland v. Leifchild*, 4 C. B. 529; *Weedon v. Woodbridge*, 13 Q. B. 462. — ED.



the plaintiff should not be paid for the said work and materials, or any part thereof, unless he should succeed in preventing the said chimney from so smoking as aforesaid. Averment, that plaintiff hath not succeeded, etc. Verification.

Demurrer, assigning for causes, that the plea amounts to the general issue, and is argumentative, and an evasive and indirect denial of the cause of action, and does not sufficiently traverse, or confess and avoid it.

The case was now argued.<sup>1</sup>

Busby, for the plaintiff. The plea, instead of confessing the contract, alleges matter to show that it never was made as alleged in the declaration; it is therefore bad, and falls within the principle of the cases collected in Com. Dig. Pleader (E. 13), and (E. 14). It is true that not only matter in confession and avoidance may be specially pleaded, but also matter of law which may be given in evidence on the general issue. In *Carr v. Hinchliff*, 4 B. & C. 547, the plea was upheld on both these principles. But the present case does not fall within either. The case is the stronger, because here the plea goes to a part only of the consideration; and therefore the unnecessary prolixity, which is the fault against which the rule was intended to guard,<sup>2</sup> is aggravated.

Martin, *contra*. The plea is good, whether considered with reference to the new rules, or independently of them. The declaration alleges a performance of work and supply of materials at the defendant's request; and from the fact so alleged it seeks to raise a legal implication of a promise. The general issue would amount to a denial of that fact, and of nothing more;<sup>3</sup> but that fact is here admitted; the plea therefore suggests a defence which the general issue would not raise. It is assumed on the other side that a plea in confession and avoidance, to a declaration in *indebitatus assumpsit*, must confess the debt; whereas it need only confess the fact alleged as the ground of implying the promise. That being confessed, a *prima facie* right in the plaintiff is admitted, which the defendant is to avoid by new matter. Thus, in the new rules of pleading, it is said<sup>4</sup> that, in *indebitatus assumpsit* for goods sold and delivered, non-assumpsit denies merely the sale and delivery in point of fact. Here the plea certainly shows that the contract was conditional; but it lay upon the defendant to allege the condition and deny its performance, as he could not deny the substantive

<sup>1</sup> Before Lord Denman, C. J., Little Dale, Patteson, and Williams, JJ.

<sup>2</sup> See *Warner v. Wainsford*, Hob. 127 (ed. 5).

<sup>3</sup> Rule, H. 4 W. 4, Assumpsit, 1, 5 B. & Ad. vii.

<sup>4</sup> 5 B. & Ad. vii. viii.

fact. [Littledale, J. Certainly the new rules so far treat a contract, with a condition and without it, as the same thing, that they do not allow separate counts on each.]<sup>1</sup> The cases given in the new rules, under Assumpsit 3,<sup>2</sup> show that the special plea need not confess the debt, but only the fact which *primâ facie* raises a promise. Thus, coverture, illegality of consideration, unseaworthiness, misrepresentation, concealment, are all matters which show that the debt never arose; yet they are to be specially pleaded, because they do not deny the fact alleged as the foundation of the debt. In *Potts v. Sparrow*, 1 New Ca. 594, it was held that an objection to an action of assumpsit for the costs of preparing an illegal agreement could not be taken on a plea of non-assumpsit, though it was urged that the new rules applied only where the illegality objected to was in the contract, the breach of which was the subject of the action itself. *Edmunds v. Harris*, 2 A. & E. 414; s.c. 4 N. & M. 182, goes much beyond the present case. [Lord Denman, C. J. If that decision be correct, no doubt it is an authority in your favor; but some of the other cases put by you are instances of facts *dehors* the contract, and where, but for such facts, there would be a good contract. Perhaps the rule as to goods sold and delivered is not expressed so correctly as it might be.] Here that has been done for the defendant upon which, but for the matter alleged in the plea, the plaintiff would have an implied right to sue. [Patteson, J. It has been said that the "denial of the sale and delivery in point of fact" means, of the sale and delivery laid in the declaration; that is, a sale and delivery to be paid for on request; and that, if it appear that the payment was to be on a future day, or upon condition, the sale and delivery alleged are negatived; and that therefore such a defence amounts to the general issue.] The plea here, correctly speaking, does not show that the plaintiff was to be paid only if a certain event occurred, but that his right was to be defeated in case of the non-occurrence of the event: that is not a traverse, but new matter. In *Waddilove v. Barnett*, 2 New Ca. 538, the declaration was in assumpsit for use and occupation; and it was held that the defendant could not, under the general issue, show that after the rent became due he had received notice from a party to whom the plaintiff had mortgaged the premises before the occupation commenced, and that he had paid such party accordingly. [Lord Denman, C. J. There the defence went to show that the plaintiff was not the real owner.] That could not have been the principle

<sup>1</sup> R. H. 4 W. 4, General Rules and Regulations, 5, 5 B. & Ad. ii.

<sup>2</sup> 5 B. & Ad. viii.

of the decision; for such a principle would also apply to rent becoming due after the notice from the mortgagee; whereas it was held that, as to this, the defence might be shown under non-assumpsit. The principle was that, as to the last-mentioned rent, the occupation by the sufferance and permission of the plaintiff, which was the fact raising the contract, was negatived by the evidence: as to the rent due before the notice, such occupation was not negatived but admitted; and therefore matter showing that, though the fact raising the contract was true, still the debt had not arisen, was held not to be admissible in proof under non-assumpsit.

Then, independently of the new rules, this matter might be specially pleaded. It is necessary only that a special plea of this kind should, as this does, give color to the plaintiff. Stephen on Pleading, 421 (ed. 3). *Carr v. Hinchliff*, 4 B. & C. 547, shows this, and proves that a plea does not necessarily amount to the general issue, because the defence which it suggests might have been shown under the general issue. *Bird v. Higginson*, 2 A. & E. 696, is to the same effect. [Busby. The court did not expressly decide that point. *Littledale, J.* They gave judgment for the defendant, though the objection was assigned on special demurrer to the plea. In special actions on the case for disturbance, every one knows that the answer may be pleaded specially.] And that, whether it be by way of confession and avoidance, or by way of raising a question of law. [Littledale, J. It is said in *Com. Dig. Pleader* (E. 14) that this objection should be taken by motion, not by demurrer.<sup>1</sup> That seems not to be considered law now.<sup>2</sup>]

*Cur. adv. vult.*

Lord Denman, C. J., on a subsequent day of this term (June 13th), delivered the judgment of the court. After stating the declaration, the plea, and the demurrer, and causes assigned, his Lordship proceeded as follows:—

It must be first considered, whether the defence set up in the plea could be given in evidence under the general issue of non-assumpsit; because, if it could not, then there is no ground for the demurrer.

There is no doubt but it might be so before the new rules, because not only might the fact of the actual contract itself be denied, but also it might be proved that it was void in law, or that

<sup>1</sup> Citing *Warner v. Wainsford*, Hob. 127 (ed. 5), and *Ward and Blunt's Case*, 1 Leon. 178.

<sup>2</sup> See Stephen on Pleading, 421 (ed. 3).

the contract itself had been performed, or that the defendant was excused from the performance of it by many other circumstances.

But, since the new rules (and which have the force and effect of an act of Parliament) in actions of assumpsit, "the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." In actions of assumpsit for goods sold and delivered, the plea of non-assumpsit will operate as a denial of the sale and delivery in point of fact. And "in every species of assumpsit all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded."

One of the general objects of these new rules was to compel a defendant to put his defence specially upon the record. And in conformity with this object the case of *Edmunds v. Harris*, 2 A. & E. 414; s. c. 4 N. & M. 182, was decided. It was an action of debt for goods sold and delivered, to be paid for on request, and which as to this is the same thing as *indebitatus assumpsit*; to which there was a plea of never indebted; and it appeared on the trial that the goods were sold on a credit which had not expired when the action was brought; and, on a question whether this defence was admissible on the general issue, the Court of King's Bench held it was not, and that it ought to have been specially pleaded, and that it was one of the cases which the new rules were framed to avoid. But that case was doubted in *Taylor v. Hilary*, 1 Cr., M. & R. 741; s. c. 5 Tyrwh. 373, on the ground that, if the time of credit has not expired, the plaintiff proves a different contract from that which he has stated in the declaration, which was to pay on request. And, so also in *Knapp v. Harden*, 1 Gale, 47, Parke, B., considered it as doubtful whether *Edmunds v. Harris*, *supra*, was properly decided. We think, therefore, that the case of *Edmunds v. Harris*, *supra*, cannot be considered as a binding authority; and, if not, as the defence set up on this record shows a different contract from that which is stated in the declaration, inasmuch as the contract stated in the plea is that the money should be paid on a certain condition which has not been performed, it is not a contract to pay upon request; and therefore the defence might be gone into upon the general issue.

And in the case of *Waddilove v. Barnett*, 2 New Ca. 538, it was held, in an action for use and occupation, that, under the issue of "non-assumpsit, the defendant might give in evidence that the

plaintiff had mortgaged the premises before the defendant came into the occupation, and that the mortgagee had given notice to the defendant not to pay the plaintiff any rent becoming due after such notice. And this was determined by the court after considering the effect of the new rules.

But, though the defence might be gone into under the general issue, it does not necessarily follow that the defence may not be specially pleaded on the record.

In the case of *Carr v. Hinchliff*, 4 B. & C. 547, a defence was put upon the record, which, it was admitted, might have been gone into upon the general issue, and yet allowed to be a good plea. It was an action for goods sold and delivered; and the plea was that the goods were sold by a third person as the agent of the plaintiff, with the proper averments of want of knowledge, etc.; and then the defendant set off a debt due from that third person. The question was much considered in that case; but there was, in the first instance, a complete contract admitted by the plea of the *prima facie* liability of the defendant to the action, because, independently of the set-off, the defendant would have been liable; there was therefore a confession of the contract stated by the plaintiff; but the plea stated matters which avoided it so far as to exonerate the defendant from the performance of it.

There is a great distinction between the case of a plea which amounts to the general issue, and a plea which discloses matter which may be given in evidence under the general issue. Under the latter, as has been observed in the earlier part of this judgment, the various things enumerated may be given in evidence under the general issue, independently of any of the new rules; but it is incorrect language to say that these things amount to the general issue: they only defeat the contract; but what, in correct language, may be said to amount to the general issue is, that, for some reason specially stated, the contract does not exist in the form in which it is alleged, and, where that is the case, it is an argumentative denial of the contract, instead of being a direct denial; and which, according to the correct rule of pleading, is not allowed.

The allegation in the declaration is that the defendant is indebted for work and labor and materials; and that, being so indebted, he promised to pay on request. The plea does not confess that the defendant was indebted at all; it admits that work was done, and materials were found and provided: but, instead of confessing that any debt was created by that, and showing anything to avoid it, he says that no money was to be paid unless the chimney was cured of smoking, which was not done; and which is really saying, in the

most distinct terms, that no debt ever arose, and therefore falls completely within the meaning of what may be termed an argumentative denial of the debt.

In *Solly v. Neish*, 2 C. M. & R. 355; s. c. 5 Tyrwh. 625; 1 Gale, 227, the declaration was for money had and received. The defendant pleaded that the money was the proceeds of goods pledged to the defendant, with a power of sale, by persons who were allowed by the plaintiffs to hold the goods as their own, and which, in fact, were the property of those persons and the plaintiffs, and that the defendant was willing to set off against the proceeds of the goods the advances made on them. There were subsequent pleadings which led to a demurrer. The court, though they gave judgment for the defendant, said the plea would be bad on a special demurrer. In *Gardner v. Alexander* the declaration was for goods bargained and sold; the defence was that they were sold under a special contract that they should be shipped within the current month and landed in London within a given time, which was not done. On an application to plead several matters, the question was, whether these facts could have been given in evidence under the general issue, or whether it was necessary to plead them specially. The Court of Common Pleas said it was unnecessary to plead them; the special contract might be given in evidence under the general issue. And in *Cousins v. Paddon*, 2 C. M. & R. 547; s. c. 5 Tyrwh. 535, in the Exchequer, Michaelmas Term, 1835, it was held that, in debt for goods sold and delivered, and work and labor, the defendant may give in evidence, on the general issue of never indebted, that the goods were worthless and the work useless.

Upon the whole, therefore, we are of opinion that the plea now before us cannot be supported, and that there must be judgment for the plaintiff.

Judgment for the plaintiff.

### III. REPLICATION DE INJURIA AND SPECIAL TRAVERS.

A. thus complains of B., "B. hit me."

B. answers, "I did hit you, but you hit me first" (*son assault demesne*).

A. replies, "*De injuria sua propria absque tali causa*." The defendant committed the said trespass "Of his own wrong, without such cause" as the defendant alleges.

"OF THE TRAVERSE DE INJURIA.—There is another species of traverse, which varies from the common form, which, though con-

fined to particular actions, and to a particular stage of the pleadings, is of frequent occurrence. It is the traverse *de injuria sua propria, absque tali causa*, or (as it is more compendiously called) the traverse *de injuria*. It always tenders issue; but, on the other hand, differs, like many of the general issues, from the common form of a traverse, by denying in general and summary terms, and not in the words of the allegation traversed." Stephen, Pleading, Andrews' 1st ed. 241.

"As the general issue allowed the defendant to deny by a brief formula the material averments of the plaintiff's declaration, so this species of traverse, which occurs only as a replication, gave the plaintiff a similar privilege in certain cases, with respect to the defendant's plea." Perry, Pleading, 252.

The uses of the replication *de injuria* may be gathered from the following pages.

(a) *Replication de Injuria.*

EDWARD CROGATE'S CASE.

IN THE KING'S BENCH. 1608.

REPORTED IN 8 REPORTS, 66.

The qualities of the replication *de injuria* stated.

Edward Crogate brought an action of trespass against Robert Marys, for driving his cattle in Town-Barningham, in Norfolk, etc. The defendant pleaded that a house and two acres in Bassingham, in the said county, were parcel of the manor of Thurgarton, in the same county, and demised, and demisable, etc., by copy, etc., in fee-simple, etc., according to the custom of the manor, of which manor William, late Bishop of Norwich, was seised in fee in the right of his bishopric, and prescribed to have common of pasture for him and his customary tenants of the said house, and two acres of land *in magna pecia pasturæ vocat'* Bassingham common, *pro omnibus averiis, etc., omni tempore anni*, and the said bishop, at such a court, etc., granted the said house and two acres, by copy, to one William Marys, to him and his heirs, etc. And that the plaintiff put his said cattle in the said great piece of pasture, wherefore the defendant, as servant to the said William, and by his commandment, *molliter* drove the said cattle out of the said place, where the said William had common *in præd' villam de* Town-Barningham, adjoining to the said common of Bassingham, etc. The plaintiff replied

*de injuria sua propria absque tali causa.* Upon which the defendant demurred in law. And it was objected on the plaintiff's part that the said replication was good, because the defendant doth not claim any interest, but justifieth by force of a commandment; to which *de injuria sua propria absque tali causa* may be fitly applied: and this plea, *de injuria sua propria*, shall refer only to the commandment, and to no other part of the plea; and they cited the books in 10 Hen. VI. 3 a, b, 9 a; 16 Hen. VII. 3 a, b, etc.; 3 Hen. VI. 35 a; 19 Hen. VI. 7 a, b, etc. But it was adjudged that the replication was insufficient. And in this case divers points were resolved.

1. That *absque tali causa* doth refer to the whole plea, and not only to the commandment, for all maketh but one cause, and any of them, without the other, is no plea by itself. And therefore, in false imprisonment, if the defendant justifies by a *capias* to the sheriff, and a warrant to him there, *de injuria sua propria* generally is no good replication, for then the matter of record will be parcel of the cause (for all makes but one cause), and matter of record ought not to be put in issue to the common people, but in such case he may reply *de injuria sua propria*, and traverse the warrant, which is matter in fact. But upon such a justification, by force of any proceeding in the Admiral Court, hundred, or county, etc., or any other which is not a court of record, there *de injuria sua propria* generally is good, for all is matter of fact, and all makes but one cause. And by these differences you will agree your books in 2 Hen. VII. 3 b; 5 Hen. VII. 6 a, b; 16 Hen. VII. 3 a; 21 Hen. VII. 22 a (33); 19 Hen. VI. 7 a, b; 41 Edw. III. 29 b; 17 Edw. III. 44; 18 Edw. III. 10 b; 2 Edw. IV. 6 b; 12 Edw. IV. 10 b; 14 Hen. VI. 16; 21 Hen. VI. 5 a, b; 13 Rich. II. Issue 163.

2. It was resolved that when the defendant in his own right, or as a servant to another, claims any interest in the land, or any common, or rent going out of the land, or any way or passage upon the land, etc., there *de injuria sua propria* generally is no plea. But if the defendant justifies as servant, there *de injuria sua propria* in some of the said cases, with a traverse of the commandment, that being made material, is good; and so you will agree all your books, *scil.*, 14 Hen. IV. 32; 33 Hen. VI. 5; 44 Edw. III. 18; 2 Hen. V. 1; 10 Hen. VI. 3, 9; 39 Hen. VI. 32; 9 Edw. IV. 22; 16 Edw. IV. 4; 21 Edw. IV. 6; 28 Edw. III. 98; 28 Hen. VI. 9; 21 Edw. III. 41; 22 Ass. 42; 44 Edw. III. 13; 45 Edw. III. 7; 24 Edw. III. 72; 22 Ass. 85; 33 Hen. VI. 29; 42 Edw. III. 2. For the general plea, *de injuria sua propria*, etc., is properly when the defendant's plea doth consist merely upon matter of excuse, and of no matter of interest whatsoever; *et dicitur de injuria sua*



*propria*, etc., because the injury properly in this sense is to the person, or to the reputation, as battery or imprisonment to the person, or scandal to the reputation; there, if the defendant excuse himself upon his own assault, or upon hue-and-cry levied, there properly *de injuria sua propria* generally is a good plea, for there the defendant's plea consists only upon matter of excuse.

3. It was resolved, that when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuria sua propria*. The same law of an authority given by the law; as to view waste, etc. *Vide* 12 Edw. VI. 10; 9 Edw. IV. 31; 20 Edw. IV. 4; 42 Edw. III. 2; 16 Hen. VII. 3.

Lastly, it was resolved that, in the case at bar, the issue would be full of multiplicity of matter, where an issue ought to be full and single for parcel of the manor, demisable by copy, grant by copy, prescription of common, etc., and commandment would be all parcel of the issue. And so, by the rule of the whole court, judgment was given against the plaintiff.

### TAYLOR *v.* MARKHAM.

IN THE KING'S BENCH. 1609.

REPORTED CROKE'S JAMES, 224.

*De injuria* will not put immaterial matter in issue.

In an action of trespass and battery, the defendant pleaded, that he, at the time of, etc. was seised of the rectory of D. in fee; and that at the same time and place where the trespass and battery were supposed, etc. corn was severed from the nine parts: and for that the plaintiff would have carried away his corn, the defendant there stood in defence thereof, and kept the plaintiff from carrying it away; so as the harm which the plaintiff received was of his own wrong, etc. The plaintiff replies, that the trespass and battery were done *sans tiel cause alledge*, etc. Whereupon the defendant demurred in law.

It was adjudged for the plaintiff; for it is not requisite in this case for the plaintiff to answer the defendant's title, because he does not by this action claim anything in the land or corn, but only damages for the battery, which is collateral to the title; and therefore the general replication [*de injuria*] is good: but when the plaintiff makes a title in his declaration to anything, and the de-

fendant pleads another thing against it, the plaintiff must reply especially, and not say *sans tiel cause*, as it is in 14 Hen. IV. and 16 Edw. IV.

ISAAC *v.* FARRAR.

IN THE EXCHEQUER. 1836.

REPORTED I MEESON & WELSBY, 65.

*De injuria* can be used in *assumpsit*.

Assumpsit by the indorsee against the maker of a promissory note for £250, payable three months after date to the order of the maker, and by him indorsed to one Henry Richardson, who indorsed it to the plaintiff.

Plea, that before the making of the said promissory note, to wit, on, etc., a certain advertisement had been and was inserted in a certain newspaper, to wit, the Morning Herald, to the tenor and effect following, viz. : " Money to lend upon personal security. — Noblemen, clergymen, and persons of responsibility, requiring the temporary advance of money, can be immediately accommodated with loans to any amount, at a very low rate of interest ; application to be made in the first instance in writing, addressed to Mr. Anderson, Fludyer Street, Westminster." And the defendant averred, that in consequence of the advertisement he did, to wit, on, etc., call at the said place, to wit, etc., and there saw one Charles Anderson, and that in consequence of the representations made to him by the said C. Anderson, he the defendant was induced to draw and deliver, and he did then draw and deliver, to the said Anderson, two promissory notes, whereby and by each of which the defendant promised to pay to his own order the sum of £250, three months after the date thereof, (one of them being the said note in the said first count mentioned,) upon the faith of and promise from the said Charles Anderson, that the said notes should be renewed, when due, for the space of two years, and that he should receive from the said Charles Anderson, on a certain day, to wit, the Friday then next following, being, to wit, the first day of May, 1835, the amount of the said notes, deducting discount and stamp. And the defendant further saith, that the said Charles Anderson did not nor would, either on Friday the said first day of May, 1835, or at any other time, (although often requested so to do,) pay to the said defendant the amount of the said notes, deducting as aforesaid, or any sum of money whatever ; but on the contrary thereof, the defendant saith, that he the said defendant, to wit, on the said first day

of May, 1835, by appointment of the said Charles Anderson, went to the said place, to wit, 12 Fludyer Street, but the said Charles Anderson was not, nor was any such person, either then or at any time afterwards, there to be found, and that the said transaction was a gross fraud and imposition upon him the defendant, and that the note was indorsed to the plaintiff without consideration, and that he holds the same without value or consideration, and that there never was and is not any consideration or value on the said note between any parties thereto; and he further saith, that the said Henry Richardson, and the said plaintiff, and each of them, at the several and respective times when the said note in the said first count mentioned was so indorsed and delivered to them respectively, as in the said first count mentioned, was privy to and had full knowledge and notice of the said transaction in this plea detailed, and of the said fraud and imposition: and this the defendant is ready to verify.

Replication. That the defendant of his own wrong, and without the cause by him in that plea alleged, broke his said promise in the said first count mentioned, in manner and form as the said plaintiff hath in the said first count of the said declaration in that behalf complained against him, etc.

Special demurrer, assigning for causes — First, that the replication *de injuria* is a bad plea to the defendant's plea in assumpsit. Secondly, that the replication is bad for duplicity, because it is too large, and puts in issue all the several facts alleged by the plea, instead of putting in issue the point to be tried between the parties. Thirdly, that the facts of the fraud and notice to the plaintiff, and the want of consideration for the note in the plaintiff's hands, alleged by the plea, are distinct and separable facts, on either of which the plaintiff might and ought to have tendered an issue, and he cannot by his replication put both in issue; and the replication, because it puts both such facts in issue, is bad.

The case was argued in the present term, by Hoggins, in support of the demurrer; and by Humfrey, *contra*, in support of the replication.

The court took time to consider, and the judgment of the court was now delivered by

Lord Abinger, C. B. On this demurrer to the replication, two objections were made: First, that its form was improper, as the inducement of *de injuria*, etc., was inapplicable to an action of assumpsit; and, secondly, that it was bad because it was multifarious, and put in issue several distinct facts, each of which would, if disproved, be decisive of the action.

We think the replication is good, notwithstanding these objections.

This form, though most commonly used in actions of trespass, or trespass on the case for an injury, is not inappropriate to an action of trespass on the case for a breach of promise, where the plea admits a breach, and contains only matter of excuse for having committed that breach. The defendant's breach of promise may be considered as a wrong done, and the matter included under the general traverse *absque tali causa*, and thereby denied, as matter of excuse alleged for the breach. — Per Lord Ellenborough, *Barnes v. Hunt*, 11 East, 455.

No case in which this form of replication has been held to be improper, resembles the present. In *Crisp v. Griffiths*, 2 C. Mee. & Ros. 159, the plea was not matter of excuse for the breach of contract, but of subsequent satisfaction for that breach. In *Solly v. Neish*, 2 C. Mee. & Ros. 355, the plea was a denial of the promise. So, in *Whittaker v. Mason*, 2 Bligh, New C. 359; s. c. 2 Scott, the plea denied the contract as alleged; and although the court intimated that it might be doubtful whether a traverse in this form was applicable to any action on promises, they abstained from deciding that question. On the other hand, in the case of *Noel v. Rich*, 2 C. Mee. & Ros. 360, this court expressed a strong opinion that this general form of traverse, in a case similar to the present, was proper: and we think that it is; for the plea confesses that the defendant made the note in question and indorsed it to Richardson, who indorsed it to the plaintiff, which constitutes a *prima facie* case of liability, and an implied promise to pay the amount to the plaintiff; and it avoids the effect of that admission by showing that the note was made and indorsed without value *bona fide* paid, whereby the defendant was excused from performing that promise.

As to the objection that the replication is multifarious, the facts contained in the plea, though they are several, constitute one ground of defence; and the rule of pleading is not that the issue must be joined on a single fact, but on a single point of defence. This was laid down by Lord Mansfield in *Robinson v. Raley*, by the Court of King's Bench in *O'Brien v. Saxon*, and by Mr. Justice Bayley in the case of *Carr v. Hinchliff*, 7 D. & R. 42; 4 B. & C. 547. In each of these cases, the facts there allowed to be included in one issue, as amounting to a single ground of defence, were several. In the first, the facts that the cattle were commonable, and levant and couchant, constituted one proposition, viz., that the cattle were entitled to common; in the second, the trading, petitioning creditor's debt, and act of bankruptcy, formed one point of de-

fence, viz. the bankruptcy of the plaintiff; and in the last, the facts of the goods, for the price of which the action was brought, being sold by an agent as principal, and a set-off of a debt due from the agent, constituted the defence of payment, or satisfaction of the plaintiff's demand.

So, in the present case, the plea contains in substance one ground of defence only, that is, that the plaintiff was not the *bona fide* holder for value, although several facts are necessarily averred as constituting parts of it. Every indorsee of a bill has his own title, and that of each intermediate party; and if he or any of such parties gave value for the bill without fraud, he is a holder for value. The plea in this case alleges in effect that the defendant had no value for making the note, and that neither the first indorsee, nor the second, received the bill *bona fide*, which is only a statement, necessary in point of law, of the several facts constituting the defence, that the plaintiff is not a *bona fide* holder for value.

If this replication were not allowed, some inconvenience would follow, for in every action on a bill or note it would be competent for a defendant, by alleging fraud, or such other circumstance as would throw the proof of value on the indorsee, to compel him to prove it. For it would seldom happen that a plaintiff, if he were tied down to dispute one fact, could take issue on such an allegation; and then he would be obliged to take an issue which would admit the fraud, and throw the proof of value on himself, thereby placing him in a worse situation than before the late rules. On the other hand, if this replication be allowed, the indorsee is left in the same situation as he was before, with the additional advantage that he is made acquainted with the defence intended to be set up, which was one grand object of the pleading regulations; and he will be called upon to prove value given or not, accordingly as the defendant shall prove or fail in the proof of the allegation of fraud, as he would before under the general issue.

We do not, however, decide this case on the ground of convenience, but in conformity with the established rules of pleading; and we are of opinion that the demurrer must be overruled.

Judgment for the plaintiff.

THOMAS COCKERILL *v.* MATTHEW ARMSTRONG AND  
SIX OTHERS.

IN THE COMMON PLEAS. 1738.

REPORTED WILLES, 99.

When the plaintiff in his declaration makes title, and the defendant replies against it, *de injuria* is not a good replication.

The opinion of the court was thus delivered by

Willes, Ld. C. J. Trespass for taking, leading away, and impounding a gelding of the plaintiff's, and for keeping him in pound for the space of four days, etc. Damage, £30.

The defendants all pleaded a special plea, that the place where the gelding was taken at the time when, etc., was a close called Weapness, containing 1000 acres of pasture ground; of which said 1000 acres the bailiffs and burgesses of the borough of Scarborough were at the time, when, etc., seised in their demesne as of fee, and because the said gelding in the declaration mentioned at the time, when, etc., was in the said 1000 acres feeding upon and eating the grass there growing, and doing damage there, the said Matthew, etc., as servants of the bailiffs and burgesses of the said borough, and by their command, took the said gelding so feeding and doing damage there, and impounded the said gelding in the common and open pound at Scarborough aforesaid, and detained him there for the time mentioned in the declaration, as it was lawful for them to do; which is the same trespass, etc.

The plaintiff replies that the defendants took away and impounded the said gelding of their own wrong, without any such cause, etc.

The defendants demur; and for cause of demurrer show that the plaintiff in his replication hath traversed the said several matters contained in the plea, whereas he should have traversed one single matter, whereon a proper issue might have been joined; and that the said replication is uncertain, etc. The plaintiff joins in demurrer.

The single question is,<sup>1</sup> whether *de injuria sua propria absque tali causa* be a good replication, and we are all of opinion that it is not a good replication, for two reasons, both expressly laid down in Crogate's Case.

<sup>1</sup> This case was twice argued, the first time in Easter, 1738, by Eyre, King's Serjt., for the defendants, and Bootle, Serjt., for the plaintiff; and again on the 10th of June, 1738, by Wynne, Serjt., for the former, and Burnett, Serjt., for the latter.

The first of them is the reason assigned as the cause of the demurrer, because it puts several things in issue, whereas the issue ought to be plain and single. For upon this issue the defendants must prove that the bailiffs were seised in fee (or, at least, that they were possessed); that the defendants acted by their command; that the gelding at the time when he was taken was in a close called Weapness, and that he was depasturing the grass and doing damage there.

The other rule, which is laid down by Lord Coke, is, that when the defendant in his own right, or as servant to another, claiming any interest in the land, or any way or passage therein, or rent issuing thereout, justifies the trespass, *de injuria sua propria absque tali causa* is not a good replication: and Crogate's Case is exactly parallel to this, only the present is a little stronger. There the action was only for chasing the plaintiff's cattle, which does not so much as imply any claim of right in the defendant; but here it is for taking away and impounding, which seems to imply a claim of right. And the plea is almost the same as this; for the defendant justifies as servant to one who claims a right in the place where, only it is not said there that the cattle were damage-feasant. So that in that respect likewise the present case is stronger than that. And yet, though the case in Coke is not so strong as the present in these two respects, *de injuria sua propria absque tali causa* was holden on a demurrer by the whole court after a solemn argument not to be a good replication.

I do not at all rely on the case in Cro. Jac. 599, because *absque tali causa* is there omitted. But the case of Taylor v. Markham, though cited for the plaintiff in this case, makes, I think, rather against him. The case itself is plainly distinguishable from this; for the action is an action of assault and battery, where the title of the land can never possibly come to be material. But it is expressly there laid down that where the plaintiff in his declaration makes a title to any thing, and the defendant pleads another thing against it or in destruction of the cause of action of the plaintiff, there the plaintiff must reply specially, and *de injuria sua propria absque tali causa* is not a good replication; which is exactly the present case. And there is a case cited in Yelv., out 14 Hen. IV. 32, trespass for taking the plaintiff's servant; the defendant pleaded that the father of the person taken held of him by knight's service and died seised, the person taken being under age, and that he seised him as his ward; the plaintiff replied *de injuria sua propria absque tali causa*, and held to be no good replication; which case seems to be exactly parallel to the present. I do not rely at all on

the case of *Cooper v. Monke and Others*, Willes, 52, which was determined in this court as to this point in Hilary Term, 1737; because that was an action for breaking and entering a house, which, to be sure, is plainly distinguishable from the present case. The case of *Whitnell v. Cook*, Cro. Eliz. 812, seems to be a case in point. Replevin for taking cattle; the defendant, as bailiff to one Payne, seised of the third part of the place where, justified taking them damage-feasant; the plaintiff pleaded that a stranger was seised of the other two parts, and that he put the cattle in by his license, *de injuria sua propria, etc.*, by the defendant; and that held on a demurrer not to be good, but judgment for the plaintiff.

It is said, indeed, in the case of the Archbishop of Canterbury *v. Kemp*, Cro. Eliz. 539, that where the defendant himself claims an interest in lands, this is not a good replication, but where he justifies by command of another claiming interest, there it is: but this seems to be a distinction without a difference, as the title to the land must equally come in question, and is alike necessary to be proved in both cases; and it is directly contrary to Crogate's Case.

Whether or no in the present case it was necessary for the defendant to set forth a title, or whether he might have relied only on a possession (as this is not a *quare clausum fregit*, but an action for taking a personal thing without claiming any right to the place), we need not determine, though I think it was not necessary; because he having insisted on a seisin in fee, we think it is more than an inducement, and that it is necessary to prove it, or at least a possession which is *primâ facie* a proof of a seisin in fee, and will be exactly the same thing in respect to the present point. And there is a plain difference between the present case and the case of an action for an assault and battery; because there, if the party be possessed, even though the plaintiff should have a title to the house or place, it will signify nothing; for his bare possession will justify him even turning the right owner out of the house: whereas here, if the plaintiff has a right to the place where, etc., for right of common, etc., it may quite destroy the defendant's plea. And the present case is the stronger, as the defendants have specially assigned this as a cause of demurrer.

We are therefore all of opinion that judgment must be for the defendants.



H. C. SELBY, ESQ., *v.* BARDONS AND ANOTHER.

IN THE KING'S BENCH. 1832.

REPORTED 3 BARNEWALL &amp; ADOLPHUS, 2.

*De injuria* can be used in replevin as a plea to an avowry or cognizance.

Declaration in replevin for taking the plaintiff's goods and chattels in Verulam Buildings, Gray's Inn, in the county of Middlesex, and detaining the same against sureties and pledges. The fourth avowry and cognizance were by the defendant Bardons, as collector of the poor-rates of that part of the parish of St. Andrew, Holborn, which lies above the bars, in the county of Middlesex, and of the parish of St. George the Martyr in the said county, and by the other defendant as his bailiff; and it stated that the plaintiff was an inhabitant of the said part of the parish of St. Andrew, Holborn, and by law ratable to the relief of the poor of that part of the said parish, and of the parish of St. George the Martyr, in respect of his occupation of a tenement situate in the said place in which, etc., and within the said part of the parish of St. Andrew; that a rate for the relief of the poor of that part of St. Andrew, Holborn, and of the parish of St. George the Martyr, was duly ascertained, made, signed, assessed, allowed, given notice of, and published according to the statutes; and that by the said rate the plaintiff was, in respect of such inhabitancy and occupation as aforesaid, duly rated in the sum of £7; that Bardons, as collector, gave him notice of the rate, and demanded payment, which he refused; that the plaintiff was duly summoned to appear at the petty sessions of the justices of the peace for the said county, to be holden at a time and place duly specified, to show cause why he refused payment; that he appeared, and showed no cause; that a warrant was duly made under the hands and seals of two justices of peace for the county then present, directed to Bardons as collector, requiring him, according to the statute, to make distress of the plaintiff's goods and chattels; that the warrant was delivered to Bardons, under which he, as collector, avowed, and the other defendant, as his bailiff, acknowledged the taking of the goods as a distress, and prayed judgment and a return of the goods. The plaintiff pleaded in bar that the defendants of their own wrong, and without such cause as they had in their avowry and cognizance alleged, took the plaintiff's goods and chattels, etc. To this plea there was a special demurrer, and the causes assigned were, that the plea in bar tendered and offered to put in issue several distinct

matters,—the inhabitancy of the plaintiff; his chargeability to the relief of the poor, in respect of his occupation mentioned in the avowry and cognizance; the ascertainment, making, signing, assessing, allowance, notice, and publication of the rate; the rating and assessment of the plaintiff; the notice to him of the rate; the demand and refusal of the sum assessed; the summons, the appearance before the justices, the warrant of distress, and delivery thereof to the defendant Bardons. Another cause assigned was, that the plea in bar was pleaded as if the avowry and cognizance consisted wholly in excuse of the taking and detaining, and did not avow and justify the same, and claim a right to the goods and chattels by virtue of the statutes. To the fifth and six avowries and cognizances, which were similar in form to the fourth, the plaintiff pleaded *de injuria*; and there were special demurrers, assigning the same causes as above. The plaintiff joined in demurrer.

The case was argued in last Michaelmas Term by Coleridge in support of the demurrer, and Maule, *contra*. The judges, not being agreed in their opinions, now delivered judgment seriatim. The points urged and the authorities cited in argument are sufficiently stated and commented on in the opinions delivered by them.

Patteson, J. The pleas in bar to the fourth, fifth, and sixth cognizances are so entirely at variance with one of the principal objects of special pleading, viz. that of bringing the parties to clear and precise issues of fact or of law, that I cannot bring my mind to consider them as maintainable upon principle. But if, upon the authority of decided cases, it should appear that they are maintainable, I am not prepared to overrule those cases upon any opinion that I may entertain respecting the inconvenience of so general a form of issue; and I am free to confess that, after an attentive examination of the authorities, I am of opinion that the pleas are maintainable.

The leading case upon the subject (I mean Crogate's Case, for the Year-Books throw little light on the subject) is by no means consistent in all its different parts, and much that is contained in the four resolutions is unnecessary to the decision of the case itself.

The pleadings were in substance as follows: Trespass for driving cattle. Plea, a right of common as copy-holder in a piece of pasture into which the plaintiff had put his cattle; and that defendant, as servant of the commoner, drove them out. Replication, *de injuria sua propria absque tali causa*.

The first resolution is in substance this: that the replication *de*

*injuria absque tali causa* refers to the whole plea; for all is but one cause. The second resolution is, that where any interest in land, or common, or rent of or way over land is claimed, *de injuria* is no plea; for it is properly when the plea does consist of matter of excuse only, and no matter of interest whatever. The third resolution is, that where the defendant justifies under authority from the plaintiff, *de injuria* is no plea; so where he justifies under authority of law. The fourth resolution is, that the issue in the case then at bar would be full of multiplicity.

Upon the authority of this case, if the pleas in bar now under consideration be bad, they must be so on one of the following grounds:—

Either that the avowries claim some interest, or that the defendant justifies under authority of law within the meaning of the third resolution, or that they are bad for multiplicity.

In the first place, as to any claim of interest, it is plain that the avowries claim no interest whatever in land, the sort of interest to which the second resolution is in words confined. But, supposing any interest in goods were within the spirit of that resolution, still, I apprehend that it must be an interest existing antecedent to the seizure complained of, and not one which arises merely out of that seizure; otherwise this plea could never be good in replevin where a return of goods is claimed, and, of course, an interest in them is asserted. Indeed, it seems to be considered in some text-books that this plea in bar can never be used in replevin; but on reference to the authorities cited for that position, they all appear to be cases where an interest in land was claimed by the avowry. In this respect, I confess that I cannot see any distinction between an action of replevin and one of trespass; and as the plaintiff can bring either at his election, it would be strange if he should be able by suing in trespass to entitle himself to the general form of replication, but if he sues in replevin should be debarred from it. The case of *Wells v. Cotterel*, 3 Lev. 48, was cited at the bar to establish that the plea of *de injuria* is good in replevin; but it appears in that case that three of the judges held it good against the opinion of the fourth, but that all the court held the avowry bad, and therefore no decision was necessary as to the plea. On the other hand, the case of *Jones v. Kitchin* is commonly referred to as establishing the position that this plea in bar can never be used in replevin; but it does not go that length, for the avowry there was for rent in arrear, and, therefore, *de injuria* would have been equally bad had the form of the action been trespass. For, in *White v. Stubbs*, 2 Saund. 294, which was an action of trespass,

*de injuria* was held to be a bad replication, the plea claiming an interest in land, and justifying the taking the goods as encumbering a room to which the defendant showed title.

As, therefore, the avowries in this case show no interest in land or in the goods seised, except that which arises from claiming a return; and as I find no authority for saying that such claim of return is an interest within the meaning of the second resolution in Crogate's Case, it seems to me that the avowries show matter of excuse only, and that, as to this ground of objection, the general pleas in bar of *de injuria* are good.

In the next place, are the general pleas bad on account of any authority in law shown by the avowries?

It is certainly stated in the third resolution in Crogate's Case, that the replication *de injuria* is bad where the plea justifies under an authority in law; but this, if taken in the full extent of the terms used, is quite inconsistent with part of the first resolution, which states, that where the plea justifies under the proceedings of a court not of record, the general replication may be used, or where it justifies under a *capias* and warrant to sheriff, all may be traversed except the *capias*, which cannot, because it is matter of record and cannot be tried by a jury. Now, the proceedings of a court not of record, and the warrant to a sheriff and seizure under it, are surely as complete authorities in law as any authority disclosed by the present avowries. With respect to the proceedings of a court not of record, a *quære* is made in *Lane v. Robinson*, 2 Mod. 102, whether a replication *de injuria* would be good; but the point did not arise in the case, and the Year-Books referred to in Crogate's Case warrant the conclusion that it would. In Bro. Abr. title *De Son Tort Demesne*, there are instances of this replication to a plea justifying by authority of law. There is also the case referred to in the argument at the bar, of *Chancy v. Win and Others*, in which it is laid down by Lord Holt, that *de injuria* is a good replication in many cases where the plea justifies under an authority in law. I do not therefore think that the present pleas are objectionable on that ground.

In the last place, are the pleas bad on account of the issue, tendered by them, being multifarious?

If this were *res integra*, I should have no hesitation in holding that they were bad; and it cannot, I think, be denied that the present issues are as full of multiplicity as that in Crogate's Case, and to which the fourth resolution there applied. But I am unable to find any instance in which this general replication has been held bad on that ground. The objection is indeed mentioned in

the cases cited from Lord Chief Justice Willes's reports, but in no one of those cases does the decision proceed on that objection alone, and in all of them there were other undoubted objections. In *Cooper v. Monke*, Willes, 52, the plea justified under a distress for rent, and the general replication was clearly bad within the second resolution in *Crogate's Case*. In *Cockerill v. Armstrong*, the plea justified under a seizure of cattle damage feasant in a close of which the bailiffs and burgesses of Scarborough were alleged to be seised in fee; an interest, therefore, was claimed in the land, and the general replication was bad within the same resolution; and Lord Chief Justice Eyre, in commenting on that case in *Jones v. Kitchin*, expressly states that the replication was bad on that ground, and not because it put two or three things in issue, for that may happen in every case where the defence arises out of several facts all operating to one point of excuse. In *Bell v. Wardell*, Willes, 202, the pleas set up a custom, which was held bad, and, therefore, any decision as to the general replication became unnecessary.

It is every day's practice where the plea justifies an assault in defence of the possession of a close, or removing goods doing damage to it, to reply *de injuria* generally, and yet this objection as to the multifarious nature of the issue would apply in both cases. The same observation holds good where this general replication is used in actions for libel or slander, in which a justification is pleaded.

Many cases are referred to in Com. Dig. tit. Pleader, (F) 18, and several following numbers, and, again, 3 (M) 29, in none of which do I find that the general form of replication has ever been held bad on account of its putting in issue several facts.

The cases of *Robinson v. Rayley*, 1 Burr. 316, and *O'Brien v. Saxon*, are authorities to show that it cannot be objected to on that account, provided the several facts so put in issue constitute one cause of defence, which, as it seems to me, they always will, where the plea is properly pleaded, however numerous they may be, since if they constitute more than one cause the plea will be double.

The present avowries state many facts undoubtedly, but they are all necessary to the defence, and combined together they show but one cause of defence, namely, that the plaintiff's goods were rightfully taken under a distress for poor-rates; and if the general replication be held bad in this case, I am at a loss to see in what case such a replication can be held good, where it puts more than one fact in issue. I am compelled therefore, however reluctantly, to come to the conclusion that the pleas in bar are good.

Parke, J.,<sup>1</sup> after stating the pleadings, proceeded as follows : —

The question for our decision is, whether the objections pointed out in the special demurrer, and which have been insisted upon in the argument before us, are well founded in law? It appears to me, upon an examination of the authorities, that they are not, and that the pleas in bar are good.

It is true that these pleas in bar put in issue a great number of distinct facts; and it is also true that the general rule is, that where any pleading comprises several traversable facts or allegations, the whole ought not to be denied together, but one point alone disputed; and I am fully sensible that the tendency of such a rule is to simplify the trial of matters of fact, and to save much expense in litigation. But it is quite clear, that from a very early period in the history of the law, an exception to this general rule has been allowed with respect to all actions of trespass on the case, in the plea of the general issue; and with respect to some actions of tort, in the replication of *de injuria sua propria absque tali causa*. This replication, where it is without doubt admissible, generally, indeed it may be said always, puts in issue more than one fact, and often a great number. For instance, in an action of assault, where there is a justification that the defendant was possessed of a house; that the plaintiff entered; that the defendant requested him to retire, and he refused; that the defendant laid his hands on the plaintiff to remove him, and the plaintiff resisted; — all these facts may be denied by this general replication. Com. Dig. Pleader, (F) 18. *Hall v. Gerard*, Latch, 128, 221, 273. So, where an obligation to repair fences, and a breach of the fences by the plaintiff is pleaded as an excuse for a trespass with cattle. Rastell, 621 a, Com. Dig. Pleader, 3 (M) 29. So, if there be a justification of assault and false imprisonment, on the ground of a felony committed, and reasonable suspicion of the plaintiff; Bro. Abr. *De Son Tort*, 49. So as to other justifications in the like action; Ibid. 18, 20. Under the precept of an admiralty court, or under a precept after plaint levied in a county or hundred court, Rastell, 668 a, many facts may be put in issue by the general replication, and there appears no question about the validity of such a replication; Crogate's Case. The case of *O'Brien v. Saxon* is a further authority to the same effect, that many facts may be included in one issue; and if many facts may be traversed, it can be no valid objection that more than usual are denied in any particular case.

<sup>1</sup> Taunton, J., delivered no judgment, having been consulted in the cause when at the bar.

I must not, however, omit to notice, there is a dictum of Lord Chief Justice Willes in the case of *Bell v. Wardell*, Willes, 204, that the general replication of *de injuria* was bad on this ground, and also in that of *Cockerill v. Armstrong*; but Lord Chief Justice Eyre, in *Jones v. Kitchin*, disapproves of that dictum, and says that the reason is not that the replication puts two or three things in issue; and both these cases may be supported on another ground, namely, that in one a right in the nature of a right of way, in the other a seisin in fee, would be included in the traverse.

It seems clear to me, therefore, that this general traverse in actions of tort is not bad on account of the multiplicity of the matters put in issue; and unless there be some distinction between actions of replevin and actions of tort (a point I shall afterwards consider), the first ground of objection must fail.

The second ground is, that the avowry and cognizance claim an interest in the goods, and that for this reason the pleas in bar are not admissible. Upon the best consideration I have been able to give to the authorities on this subject, which are (many of them) obscure and contradictory, I do not think that any interest is claimed in these pleadings, within the meaning of that word in the rules laid down on this subject. In *Crogate's Case*, the principal authority, three cases are mentioned in which the general traverse is not allowed.

The first is, where matter of record is parcel of the issue; and that for the obvious reason, that if it were permitted, it would lead to a wrong mode of trial.

The second case is, where the defendant in his own right, or as servant to another (who is by that decision put on the same footing as his master), claims an interest in the land, or any common, or rent going out of the land, or any way or passage upon the land.

The third case is, where, by the defendant's plea, any authority or power is mediately or immediately derived from the plaintiff. Under this description is included any title by lease, license, or gift from the plaintiff; Bro. Abr. *De Son Tort Demesne*, 41; or lease from his lessee; 16 Hen. VII. 3. Bro. Abr. *De Son Tort Demesne*, 53. It is also added in *Crogate's Case*, that the same law is of an authority given from the law, as to view waste; but in the case cited from the Year Book, 12 Edw. IV. 10 b, as supporting this position, the plea stated that the plaintiff claimed as tenant by statute merchant, and defendant justified his entry under his right to view waste, so that matter of record would have been in issue under the general replication. This explanation of the case was given at the bar in *Chancy v. Win*, and in the same case Lord Holt says, that

the case of a right of entry to view waste is upon a special reason, because the seisin of the lessor would be involved in the issue. As a general proposition, indeed, it is untrue that authority of law may not be included in the traverse, it being clear that an arrest by a private individual or a peace officer is by an authority from the law; and yet pleas containing such a justification may be denied by a general traverse.

Lord Coke says, after laying down these three rules, that the general plea *de injuria*, etc., is properly when the defendant's plea doth consist merely of matter of excuse, and of no matter of interest whatever. By this I understand him to mean an interest in the realty, or an interest in, or title to chattels, averred in the plea, and existing prior to, and independently of the act complained of, which interest or title would be in issue on the general replication; and I take the principle of the rule to be, that such alleged interest or title shall be specially traversed, and not involved in a general issue.

It is contended, however, on the part of the defendants, that the interest here meant is one that the party would acquire by the seizure which forms the subject of complaint, and that the replication would be improper whenever the defendant justified under any proceedings by which, if rightful, he would acquire an interest or a special property.

If this were the meaning of the term "interest," a general replication would be bad to a plea to an action of trespass justifying seizure under process of the Admiralty Court, or of any inferior jurisdiction not of record. So in case of a justification of taking beasts in withernam (16 Hen. VII. 2). So of a justification of seizure for salvage; Lilly's Entries, p. 349. And yet in all these cases it appears to be settled that the general traverse is permitted.

It seems to me, therefore, that the objection is applicable to those cases only where a party justifies as having an interest, or under one who has an interest, by title at the time of the act complained of, which interest would therefore be put in issue by the general traverse.

No case or precedent cited on the argument, or any that I am aware of, is against this construction of the rule. In *Cockerill v. Armstrong*, indeed, before referred to, which was the case of a distress, damage-feasant, and impounding, Lord Chief Justice Willes says (among other observations) that the taking away and impounding seemed to imply a claim of right; but there the plea stated a seisin in fee in the bailiffs of Scarborough, which would have been in issue; and it is on that ground that the decision of the court is



to be supported; and so Lord Chief Justice Eyre seems to have thought in *Jones v. Kitchin*.

It appears to me, then, that in an action of trespass *de bonis asportatis*, a similar justification to the present might be traversed by the general replication, as no matter of interest in the goods seized would be included in that traverse; and the only remaining question is, whether it makes any difference that the form of action is in replevin.

Some modern treatises lay it down as a general rule, that this form of pleading is inadmissible altogether in replevin;<sup>1</sup> but the authorities cited for this position do not bear it out. Finch's Law, 396, is one; after stating that in all actions of trespass merely transitory, although the defendant pleads any special matter, the plaintiff may reply generally, except where the justification is by matter of record or writing (by which he means writing in the like nature) or by some title or license from the plaintiff himself, he proceeds to state that in all local trespasses where title is claimed, the special matter must be answered; and "in replevin, which is real, the title or special matter must be always traversed." I do not think this means to include all replevins, but those only where the avowry claims title to the realty. In *Jones v. Kitchin*, a case of replevin, the plea in bar was held bad, not because it was not pleadable in replevin, but because it would put in issue a title or interest in land; and the proposition in the judgment in that case, that this plea could only be allowed in actions for personal injuries, is certainly too limited, as many authorities have been cited to show that it is applicable to trespasses to goods.

Indeed, it was conceded in the argument, that in some cases of replevin such a plea in bar would be admissible; and if admissible at all, there seems to me no reason why it should not be governed by the same rules as in an action of trespass to goods; viz. that it should not be admitted where matter of record, title, interest, or authority from the plaintiff should be put in issue by that plea in bar, but it should be in all others.

And there are some precedents in actions of replevin, of such a plea in bar, which were cited on the argument. In Lilly's Entries, 349, there was an avowry for salvage, with a prayer of judgment of a return, and such a plea in bar. In *Wells v. Cotterill*, 3 Lev. 48; Lev. Entr. 185, there was a similar plea in bar, which was held bad on the ground that it traversed matter of title, but it does not appear to have been objected to for the general reason that such a plea was inadmissible in that form of action. Upon the whole,

<sup>1</sup> 1 Chitty on Pleading, 622, 5th ed.

therefore, my opinion is, that the plea in bar is good in this case, as it puts in issue no matter of title or interest in the goods, and therefore that there should be judgment for the plaintiff.

Lord Tenterden, C. J. I consider the system of special pleading, which prevails in the law of England, to be founded upon and to be adapted to the peculiar mode of trial established in this country, the trial by the jury; and that its object is to bring the case, before trial, to a simple, and 'as far as practicable, a single question of fact, whereby not only the duties of the jury may be more easily and conveniently discharged, but the expense to be incurred by the suitors may be rendered as small as possible. And experience has abundantly proved, that both these objects are better attained where the issues and matters of fact to be tried are narrowed and brought to a point by the previous proceedings and pleadings on the record, than where the matter is left at large to be established by proof, either by the plaintiff in maintenance of his action, or by the defendant in resisting the claim made upon him. I am sensible that this principle has not always been kept in view by the courts, and that there have been, in practice, many instances of departure from it, founded upon very nice and subtle distinctions. The decisions of our predecessors, the judges of former times, ought to be followed and adopted, unless we can see very clearly that they are erroneous, for otherwise there will be no certainty in the administration of the law; and if I had found the question in this cause distinctly decided in any former case, I should have thought it my duty to abide by the decision, especially in a matter regarding rather the course of proceeding than a question of pure law. But after an attentive consideration of the cases quoted at the bar, and of such others as I have been able to meet with after a very diligent search, I do not find that this has been done. I find, indeed, many decisions and dicta not easily reconcilable with each other, founded, as I have already observed, upon very nice and subtle grounds, and not capable of being reduced to any plain, or, to my mind, any solid principle. There is one matter in which all the authorities in our books agree. If an action of trespass be brought for turning sheep or cattle to feed upon land in possession of the plaintiff, and the defendant justifies the act by pleading that A. B., his landlord, was seised of certain lands, and demised the same to him for a term not yet expired, and that he thereupon entered and was possessed of the demised lands; and then goes on to allege, in the ordinary form of prescription, that his landlord had right of common on the plaintiff's land for cattle levant and couchant on the demised land,

and that he put the cattle on the plaintiff's land in the exercise of that right; in such a case, I say, it is agreed by all the decisions that the plaintiff cannot reply generally *de injuria sua propria absque tali causa*, but must traverse some one of the facts alleged in the plea, admitting, for the purpose of the cause, all the others. In such a case, at least three separate and distinct facts are alleged: the seisin of the landlord, the demise to the defendant, the immemorial right of common. Every one of these three is necessary to the defence; but the plaintiff must elect which of them he will deny, and when he has so done, the cause goes down to the jury for the trial of that single fact; the jury are not embarrassed by a multiplicity of matter, and the parties are relieved from much of the expense of proof, to which they would be subjected if all the facts alleged in the plea were to be matters of proof and controversy before the jury. In the case now before the court, the avowry alleged that a poor-rate was made; that it was allowed by the justices; that the plaintiff was assessed in it for his messuage in which the distress was taken; that this messuage was within the parish; that payment of the assessment was demanded and refused; that a warrant of justices was issued to levy it, and that the goods were taken under the authority of that warrant. Many distinct and independent facts are thus alleged in the avowry, every one of which is necessary to sustain the right to take the goods, and to entitle the defendant to have them returned to him; and if this general plea in bar be good, the defendant must prove every one of them at the trial, and the jury must consider and decide upon each before a verdict can properly be given. Now, I think I might safely venture to ask any plain and unlettered man, whether he could find any difference between the two cases that I have put, either in common understanding or in sound logic. For myself, I must say that I can find none. If no such distinction exists or can be found, why should a different rule prevail? why should all the matters of fact be sent together to the jury in the one case and not in the other? To this question I am persuaded that no satisfactory answer could be given to the mind of an unlettered man. To a judge, who is to act upon the decisions of his predecessors, a binding if not a satisfactory answer might be given, by showing that the matter had been already so decided; but this, as I conceive, has not yet been done.

I find it decided, that where, in an action of trespass, the defendant's plea contains merely matter of excuse, and not matter of right, a replication in this form may be good: and to this there may, perhaps, be no objection in principle, because the matter of excuse

may, and generally will be, the only matter to be tried, any previous allegation being a matter of inducement only. I find it also laid down, that where the defendant claims any interest in land by his plea, this general replication will not be good; but it is said that it may be otherwise in the case of goods. Why there should be such a distinction I am not able to comprehend. The defendant in this case does, certainly in one of the avowries, claim an interest in the goods, because he claims to have them returned to him; but I do not rely on this. For the reasons which I have thus, perhaps imperfectly, given, and which are founded upon what I conceive to be principle, and not upon authorities, and which, therefore, render it unnecessary for me to advert to particular cases, I feel myself reluctantly bound to differ from my two learned brothers; and it is a satisfaction to me to know that my opinion, which it is my duty to give as I entertain it, cannot prejudice the plaintiff, because, notwithstanding my opinion, the judgment of the court on these demurrers must be given for the plaintiff. I would only add, that my view of the case would be the same if this were a replication to a plea in trespass, or if the defendant had pleaded instead of avowing, and so had not claimed a return of the goods.

Judgment for the plaintiff.<sup>1</sup>

(b) *Special Traverses.*

A., as heir of X., sues B. The action concerns land demised by X. to B. A. sues as B.'s landlord. B. must deny A.'s title. This he cannot do directly — a tenant is estopped directly to deny his landlord's title. Here, then, is a case where injustice will be done unless B. is given a plea which shall in some way break the spirit without breaking the letter of the estoppel rule.

Let B. say, in substance,

"X., when he leased to me this land, was seised thereof for life; he is now dead, and was continuously so seised until he died, etc.,  
*Absque hoc* (without this) the reversion of this land belongs to A.  
 and his heirs as A. alleges,  
 And this I am ready to verify, and pray judgment if A. is to have  
 this action against me."

B. has not directly denied A.'s title; the letter of the estoppel rule is unviolated, and the plea is good.

<sup>1</sup> Affirmed in Exchequer Chamber, 1 C. & M. 500; s. c. 9 Bing. 756. — Ed.

"A technical traverse,<sup>1</sup> when special, begins in most cases, with the words '*absque hoc*,'<sup>2</sup> (without this); which words, in pleading, constitute a technical form of negation. A traverse, commencing with these words, is called special; because, when it thus commences, the inducement and the negation are, regularly, both special—the former consisting of new special matter, and the latter pursuing, in general, the words of the allegation traversed, or at least, those of them which are material." Gould, Pleading, c. vii. s. 6.

"Thus, if to debt on a bond the defendant pleads, that he executed the bond by duress; and the plaintiff replies, that the defendant executed it of his own free will, and for valuable consideration, without this, that he executed it by duress, the traverse is special. For, so, also, if the defendant pleads title to land, in himself, by alleging that J. S. died seised in fee, and devised the land to him; and the plaintiff replies, that J. S. died seised in fee, intestate, and alleges title in himself, as heir to J. S. without this, that J. S. devised the land to the defendant; the traverse is special. Here the allegation of J. S.'s intestacy, etc., forms a special inducement; and the *absque hoc*, with what follows it, is a special denial of the alleged devise, i. e., a denial of it in the words of the allegation." Gould, Pleading, c. vii. s. 7.

### EFFECT AND OBJECT OF SPECIAL TRAVERSES.

"The use and object of a special traverse is the next subject for consideration. Though this relic of the subtle genius of the ancient pleaders has now fallen into comparative disuse, it is still of occasional occurrence; and it is remarkable, therefore, that no author should have hitherto offered any explanation of the objects for which it was originally devised, and in a view to which it continues to be, in some cases, adopted. The following remarks are submitted as those which have occurred to the writer of this work on a subject thus barren of better authority. The general design of a special traverse, as distinguished from a common one, is to explain or qualify the denial, instead of putting it in the direct and absolute form; and there were several different views, in reference to one or other of which the ancient pleaders seem to have been induced to adopt this course.

<sup>1</sup> "A technical traverse is one which is preceded by introductory affirmative matter, called the inducement to the traverse; and may be general [for example, the replication *de injuriâ sua propria, absque tali causâ*] or special." Gould, Pleading, c. vii. s. 4.

<sup>2</sup> In some cases "*et non*" instead of "*absque hoc*" is used. Gould, Pleading, c. vii. s. 8.

"First. A simple or positive denial may, in some cases, be rendered improper by its opposition to some general rule of law. Thus, in the example of special traverse first above given (an action of covenant for non-payment of rent by the heir of a lessor against a lessee, wherein it became material for the tenant to deny his landlord's title) it would be improper to traverse in the common form, viz.: 'that after the making of the said indenture, the reversion of the said demised premises did not belong to the said E. B. and his heirs,' etc., because, by a rule of law, a tenant is precluded (or, in the language of pleading, estopped) from alleging that his lessor had no title in the premises demised; and a general assertion that the reversion did not belong to him and his heirs would seem to fall within the prohibition of that rule. But a tenant is not by law estopped to say that his lessor had only a particular estate, which has since expired. \In a case, therefore, in which the declaration alleged a seisin in fee in the lessor, and the nature of the defense was that he had a particular estate only (e. g., an estate for life), since expired, the pleader would resort, as in the first example, to a special traverse — setting forth the lessor's limited title by way of inducement, and traversing his seisin of the reversion in fee under the *absque hoc*. \He thus would avoid the objection that might otherwise arise on the ground of estoppel.

"Secondly. A common traverse may sometimes be inexpedient, as involving in the issue in fact some question which it would be desirable rather to develop and submit to the judgment of the court as an issue in law. This may be illustrated by the second example of special traverse above given. In that case it would seem that a lease not expressing any certain term of demise had been brought to the ordinary for his confirmation; that he had accordingly confirmed it in that shape under his seal; and that the instrument was afterwards filled up as a lease for fifty years. The party relying upon this lease states that the demise was to the defendant for the term of fifty years, and that the ordinary 'ratified, approved, and confirmed his estate and interest in the premises.' If the opposite party were to traverse in the common form, — 'that the ordinary did not ratify, approve and confirm his estate and interest in the premises, etc.,' and so tender issue of fact on that point, — it is plain that there would be involved in such issue the following question of law, viz.: whether the confirmation by the ordinary of a lease in which the length of the term is not at the time expressed be valid? This question would therefore fall under the decision of the jury, to whom the issue in fact is referred, subject to the direction of the judge presiding at *nisi prius*, and the ulti-

mate revision of the court in bank. Now it may, for many reasons, be desirable that, without going to a trial, this question should rather be brought before the court in the first instance, and that for that purpose an issue in law should be taken. The pleader, therefore, in such a case, would state the circumstances of the transaction in an inducement, — substituting a special for a common traverse. As the whole facts thus appear on the face of the pleading, if his adversary means to contend that the confirmation was under the circumstances valid in point of law, he is enabled by this plan of special traverse to raise the point by demurring to the replication, on which demurrer a question of law arises for the adjudication of the court.

“By these reasons, and sometimes by others also, which the reader, upon examination of different examples, may, after these suggestions, readily discover for himself, the ancient pleader appears to have been actuated in his frequent adoption of an inducement of new affirmative matter, tending to explain or qualify the denial. But though these reasons seem to show the purpose of the inducement, they do not account for the two other distinctive features of the special traverse, viz., the *absque hoc*, and the conclusion with a verification. For it will naturally suggest itself that the affirmative matter might, in each of the above cases, have been pleaded *per se*, without the addition of the *absque hoc*. So, whether the *absque hoc* were added or not, the pleading might, consistently with any of the above reasons, have tendered issue like a common traverse instead of concluding with a verification. These latter forms were dictated by other principles. The direct denial under the *absque hoc* was rendered necessary by this consideration, that the affirmative matter taken alone would be only an indirect (or, as it is called in pleading, argumentative) denial of the precedent statement; and by a rule which will be considered in its proper place hereafter, all argumentative pleading is prohibited. In order, therefore, to avoid this fault of argumentativeness, the course adopted was to follow up the explanatory matter of the inducement with a direct denial. Thus, to allege, as in the first example, that E. B. was seised for life, would be to deny by implication, but by implication only, that the reversion belonged to him in fee; and therefore, to avoid argumentativeness, a direct denial that the reversion belonged to him in fee is added under the formula of *absque hoc*. With respect to the verification, this conclusion was adopted in a special traverse in a view to another rule, of which there will also be occasion to speak hereafter, viz., that wherever new matter is introduced in a pleading, it is improper to tender issue, and the conclusion must conse-

quently be with a verification. The inducement setting forth new matter makes a verification necessary in conformity with that rule." Stephen, Pleading, Andrews' 1st ed. 251.

### BRUDNELL v. ROBERTS.

IN THE COMMON PLEAS. 1762.

REPORTED 2 WILSON, 143.

A tenant is estopped directly to deny his landlord's title.

Covenant brought by the plaintiff upon a lease for years, as heir in reversion in fee to his father, and breach assigned for want of repairs; defendant pleads that the father when he made the lease to him was only a tenant for life, and that the father being dead the lease is determined, *absque hoc* that after making the said indenture of lease the reversion belonged to James Brudnell (the father and his heirs), as the plaintiff hath alleged in his declaration. Demurrer and joinder.

It was argued by Serjeant Hewitt for the plaintiff, that this plea was bad, because wherever a lessee accepts a lease for years by indenture, he shall be estopped to say that the lessor *nil habuit in tenementis*, and the plaintiff need not reply that estoppel, but may demur, because the declaration is on the indenture, and the estoppel appears on the face of the record; otherwise if he had declared *quod cum demisset*, etc., 1 Salk. 277, Kemp v. Goodall; and this is clearly law, for so is Co. Lit. 47; Cro. Jac. 312; Cro. Eliz. 362. And not only the lessor himself, but the grantee of the reversion, and all parties claiming under them, will have the benefit of the estoppel, which (he said) ran along with the lands; and that the plaintiff claiming as heir under the lessor, his ancestor stands in his place. 2dly, It was urged for the plaintiff that the traverse was defective and uncertain; but I heard nothing said to show that it was uncertain.

On the side of the defendant it was argued by Serjeant Nares, that this was an action of covenant brought by the plaintiff upon an indenture of lease for years made by the father of the plaintiff to the defendant, and breach assigned for want of repairs, upon a covenant in the lease; the defendant pleads that the plaintiff's father the lessor was only tenant for life, that he is dead, and the lease is determined, and traverses as above; that the lease being now at an end, there is an end of all the covenants therein, and of this action; a lease for years by tenant for life is so absolutely



determined, that no acceptance of rent by the successor to the land can make it good. Co. Lit. 341 b. Nares, Serjeant, admitted that during the life of the tenant for life (of the lessor) and the continuance of the lease, the defendant would have been estopped to say he had not the reversion in him, but he being dead, and the lease thereby at an end the lessee is, as it were, unmuzzled, and is not estopped to plead the truth, which he has done by this plea, in confessing the lease and avoiding it: and of that opinion was the whole court; they also held that the traverse was well taken; and judgment was given for the defendant *per totam curiam*. See Co. Lit. 47 b, *si non que le lease soit per fait indent*, etc., very apposite to the point of estoppel. N. Clive, Justice, said, the defendant might either traverse that the father was not seised of the reversion in fee, or that it did not descend to the plaintiff; *qua fuit concessum*.

### FORTESCUE v. HOLT.

IN THE KING'S BENCH. 1672..

REPORTED IN 1 VENTRIS, 213.

A *scire facias* was brought upon a judgment of £1,000, as administrator of J. S.

The defendant pleaded that before the administration committed to the plaintiff, viz., such a day, etc., administration was granted to J. N., who is still alive at D., and demandeth judgment of the writ.

The plaintiff replies, J. N. died, etc., and *de hoc ponit se super patriam*. And to that the defendant demurs.

For that he ought to have traversed *absque hoc*, that he was alive; for though the matter contradicts, yet an apt issue is not formed without an affirmative and a negative; and so said the court.

### PALMER v. EKINS.

IN THE KING'S BENCH. 1728.

REPORTED 2 LORD RAYMOND, 1550.

A. v. X. Covenant for non-payment of rent. Declaration: M. was seised in fee of Blackacre, and leased to X. with covenant to pay rent. X. entered, and continued possessed. M. assigned the reversion to A. The rent is due. Plea in form of a special traverse confessing that M. was a life tenant, and leased to X.; and later conveyed his reversion to A., and later died, the reversion in A. dying with him. The plea is bad.

The plaintiff, Henry Palmer, as assignee of John Palmer, brought an action of covenant against Elizabeth Ekins for non-payment of

rent, wherein he declared that John Palmer was seised in fee of the messuage, etc., and being so seised, the 27th of March, 1716, by indenture made between him on the one part, and the defendant on the other part (one part of which indenture, sealed by the defendant, the plaintiff produces in court), demised to the defendant a messuage in the parish of St. Michael Crooked Lane, London, for twelve years from Lady-day, 1716, rendering £18 per annum during the said term to the said John Palmer, his heirs and assigns, payable at four quarterly payments; that the defendant by the said indenture covenanted to pay the said rent at the days and times in the said indenture mentioned to the said John Palmer, his heirs and assigns; that by virtue of this demise the defendant entered and continued possessed of this messuage, etc., till after the 26th of March, 1725. That John Palmer, being seised of the reversion in fee, by lease and release, dated the 22d and 23d of November, 1723, conveyed it to Henry Palmer, the plaintiff in fee; then the plaintiff assigns his breach, in the defendant's not paying three-quarters rent due, and ending Lady-day, 1725. The defendant, *protestando* that John Palmer did not make such lease, for plea says, that John Palmer was seised in fee of this messuage 19th of November, 1706, and being so seised by lease and release dated the 19th and 20th of November, 1706, conveyed this messuage, etc., to one John Bragg, in fee; and traverses, *absque hoc*, that John Palmer *ad aliquod tempus post prædictum* 20th of November, 1706, *seisitus fuit de messuagio prædicto in dominico suo ut de feodo, modo et forma* as the plaintiff declares. To this plea the plaintiff demurred generally, and the defendant joined in demurrer.

This case was argued at several times by Mr. Serjt. Girdler, Mr. Serjt. Baines, and Mr. Fazakerley, for the plaintiff, and by Mr. Serjt. Belfield, Mr. Usher, and Mr. Filmer, for the defendant. And the 26th of November, 1728, I, at my brothers' desire, delivered the opinion of the court, that the plea was ill, and the plaintiff ought to have judgment. And we resolved,

That the defendant could not plead, John Palmer *nil habuit in tenementis* at the time of the lease made, to an action brought by John Palmer, supposing he had not conveyed to the plaintiff: because it appearing upon the face of the declaration that the lease was made to her by indenture made between John Palmer and her, which she had executed; she is estopped by the indenture. And for that purpose the case of *Kemp v. Goodhall*, Pasch. 4 Annæ, B. R. 6, 1 Ld. Raym. 1154, in debt for rent by indenture, if the defendant pleads *nil habuit in tenementis*, the plaintiff may demur and need not reply the estoppel, because it appears upon the

declaration ; but if the defendant plead *nil habuit in tenementis*, and the plaintiff replies *habuit*, etc., the jury may find the truth, notwithstanding the indenture.<sup>1</sup>

That this plea of the defendant amounted to a special *nil habuit in tenementis*, for by the inducement to the traverse she shows that John Palmer, in 1706, long before he made the lease to the defendant, which was in 1716, conveyed in fee to Bragg. If so, John Palmer had nothing in the messuage, etc., when he made the lease. For an estate in fee-simple is always intended to continue, unless it be shown to be conveyed away or determined. Therefore this plea amounts to a special *nil habuit in tenementis*, which is no more to be admitted to be pleaded by a lessee by indenture, than a general *nil habuit in tenementis*. But the defendant, by a proper inducement, might have made this traverse good ; as if he had pleaded in his inducement to the traverse that J. S. was seised of the messuage in fee, and being so seised conveyed it to John Palmer for his life, and that John Palmer being so seised, made the lease to the defendant, and afterwards conveyed to the plaintiff, and that then John Palmer died ; whereby he would have showed that an interest passed by the lease to the defendant as long as John Palmer lived, and that by his death the lease was determined ; then such traverse as in the present case would have been good. For the estoppel that appeared upon the face of the declaration, would have been avoided by showing an interest past ; and such plea would not have amounted to a *nil habuit in tenementis*, because an estate for life would have appeared to have been in John Palmer. But no interest appears to be in John Palmer in this case, when the lease was made to the defendant ; nor can the court intend there was any interest in him, since the plea sets out a conveyance before the lease to Bragg in fee simple, which estate must be intended to continue.<sup>2</sup>

<sup>1</sup> A portion of the case not relating to the pleadings is omitted. — Ed.

<sup>2</sup> See *Brudnell v. Roberts*, 2 Wils. 143. — Ed.

## CHAPTER X.

### RULES OF PLEADING.

#### DEPARTURE.

“A DEPARTURE in pleading is said to be when the second plea containeth matter not pursuant to his former, (and which fortifieth not the same, and thereupon it is called *decessus*, because he departeth from his former plea); and therefore whensoever the rejoinder (taking one example for all) containeth matter subsequent to the matter of the barre, and not fortifying the same, this is regularly a departure, because it leaveth the former, and goeth to another matter. As if in an assise the tenant plead a discent from his father, and giveth a colour, the demandant intituleth himselfe by a feoffement from the tenant himselfe, the plaintife cannot say, that that feoffement was upon condition, and to shew the condition broken; for that should be a cleare departure from his barre, because it containeth matter subsequent. But in an assise, if the tenant pleadeth in barre, that I. S. was seised and infeoffed him, etc., and the plaintife sheweth that he himself was seised in fee, until by I. S. disseised, who infeoffed the tenant, and he reentered, the defendant may plead a release of the plaintife to I. S. for this doth fortifie the barre.” Coke upon Littleton, 304 c.

#### WESTON v. CARTER.

IN THE COMMON PLEAS. 1658 or 1660.

REPORTED 1 SIDERFIN, 9.

Departure defined.

Upon the replication the defendant avows in O. for rent charge granted out of the manor of S. And says that the manor of S. lies in S. and O. within the county of Surrey. Lady Weston says that she hath recovered on writ of dower and hath a third part assigned in S. And shows that, etc. And so was seised as tenant in dower until the plaintiff distrained her cattle in a place called the Warren in S.

And it was argued at bar by Earle and Barnard, first, if this was departure, and, second, what is effected by the Demurrer. And by

the court [it was held] this is departure from the declaration. And it was agreed that in every replication there ought to be a town and a place assigned according to Reade and Hawkes's Case, Hob. 16. And here the Warren is the place assigned, and S. is the town, and for that it cannot be in O. where the avowry is, for the one town cannot be in the other town, nor the one place assigned in the other place assigned. And here O. will be deemed to be a town inasmuch as the avowry is supposed there, rather even more than a Parsonage-house will be deemed a town, and yet it is adjudged a town, Cro. 2, 274. Lawrence and Johns Case. Now S. is a town or not a town; if not a town the replication is not good, because a town is wanting, and if it is a town it cannot be in the town of O. And Bridgman, Chief Justice, says that as well a place assigned as a town ought to be in the replication, for that both are traversable. But if there is no place assigned by name and the Plaintiff passes it over and does not demur, that is good, and so he says the several places can be reconciled.

Now admitting O. is a Parish and that S. is in the Parish of O., yet the Plaintiff hath not title, for she hath alleged a recovery upon a writ of dower of land in S., which is a town, which Recovery does not extend to land in O. For if the Parish of D. contains 8 towns, to wit, the town of D. and of C. etc. And a fine is levied or a recovery had of land in D., this does not extend to lands in the other towns within the Parish outside of the town of D., which was agreed by the Court. Cro. 2, 120. Starke and Fox's Case agreeing.

And when she avers that the Warren in S. is in O., this averment is void for this, that it is repugnant and impossible for this that the one town cannot be in the other town as above. Note if D. be called a parish, that is a town and is sufficient, for it will not be inferred that there are several towns within the Parish if it be not shown. 1 Inst. 125 b. and Hob. 6.

And Hyde, Justice, says that a departure is when the second plea contains novel matter that does not fortify the first.

2. It was objected that thro' this demurrer the Defendant hath confessed the averment of the Plaintiff, but it was replied and resolved that notwithstanding it is often times said that a demurrer is a confession, etc., yet this is not a confession of any thing except that which is well pleaded. For things not well pleaded, which is the cause of the demurrer, are not by this confessed, but left to be determined by the Court. And judgment in the principal case was given for the Defendant. Although Atkins when he was justice here was of the contrary opinion.

MOLE *v.* WALLIS, OR BOLD *v.* WARREN.

IN THE KING'S BENCH. 1662.

REPORTED 1 LEVINZ, 81.

Covenant on an indenture of apprenticeship to serve him seven years, which he had not done, but departed. The defendant pleads infancy; the plaintiff replies the custom of London, for infants to bind themselves apprentices; the defendant demurs; and whether this was a departure? was the question. And Wyndham and Foster, Chief Justice at one time, seemed that it was not, it being laid in London, where the custom is known; and Foster cited a case, where infancy being pleaded to a feoffment, the plaintiff replied the custom of gavelkind in Kent; that an infant may make a feoffment at fifteen, and the action being laid in Kent, it was resolved to be good. Twysden and Mallet on the contrary said, that which is pleaded generally as the common law cannot be maintained by custom, but is a departure, and cited Yel. 14; Plow. Com. 105; Mich. 6 Hen. VII. pl. 4; Hil. 21 Hen. VII. pl. 29; 2 Cro. 494; Hutt. 63, 64. But they agreed, that if one pleads a statute, and the other says that it is repealed, the other may say that it is revived by another statute; or, if a man pleads a statute, and the other says it was to continue but till such a time, which is expired, the other may say, that the first statute was afterwards made perpetual, because it is only fortifying of the first matter. And in Hilary time first following, the party prayed leave to discontinue.

OWEN AND ANOTHER *v.* REYNOLDS.

IN THE KING'S BENCH. 1732.

REPORTED FORTESCUE, 341.

Debt on bond conditioned to save harmless from tonnage of coals due to William Biddle. Defendant pleads *non damnificiat*; plaintiff replies that Biddle distrained for said coals, and defendant rejoins that nothing was due to Biddle for tonnage; this held to be a good rejoinder, and no departure, for it fortifies the plea, and gives a good reason why he was not damnified.

## DUPLICITY.

"The plea of every man shall be construed strongly against him that pleadeth it, for everie man is presumed to make the best of his owne case; *ambiguum placitum interpretari debet contra proferentem.*" Coke upon Littleton, 303 b.

“The plea that contains duplicity or multiplicity of distinct matter to one and the same thing, whereunto severall answers (admitting each of them to be good) are required, is not allowable in law.” And this rule you see extendeth to pleas perpetual or peremptory, and not to pleas dilatory; for in their time and place a man may use divers of them; and hereof ancient writers speak notably: ‘Sicut actor una actione debet experiri faltem illa durante, sic oportet tenentem una exceptione, dum tamen peremptoria (quod de dilatoriis non est tenendum); quia si, licerit pluribus uti exceptionibus peremptoriis simul semel, sicut fieri poterit in dilatoriis, sic sequeretur, quod si in probatione unius defecerit, ad aliam probandum possit habere recursum, quod non est permissibile, non magis quam aliquem se defendere duobus baculis in duello, cum unus tantum sufficiat.’ But where the tenant or defendant may plead a generall issue, thereupon the generall issue pleaded, he may give in evidence as many distinct matters to barre the action or right of the demandant or plaintife, as he can.” Coke upon Littleton, 303 b.

### HAREBOTTLE *v.* PLACOCK.<sup>1</sup>

IN THE KING’S BENCH. 1607.

REPORTED CROKE’S JAMES, 21.

Ejectment of land, and a coal-pit in the same land. The defendant pleaded not guilty, and it was found against him.

It was now moved in arrest of judgment, that the declaration was not good; for he cannot demand the land itself, and a coal-pit in the same land, for that is *bis petitum*. — But the court held it to be good, because it is a personal action, and he demands nothing certainly.

### DAME AUDLEY’S CASE.

IN THE QUEEN’S BENCH. 1561.

REPORTED IN MOORE, 25.

Detinue. The defendant says that after the bailment to him by the plaintiff she married Lord Audley, who during the marriage released him of all actions. Nichols. The plea seems double, for he has pleaded two matters in bar; first, property in the husband by the marriage; second, release by the husband. And it was held by all the judges that the plea was not double, since he could not plead the release without pleading that it was after the marriage, otherwise it was not material, wherefore, etc.

<sup>1</sup> Part of the case, not bearing upon Duplicity, omitted.

GAILE *v.* BETTS.

IN THE COMMON PLEAS. 1676.

REPORTED IN 3 SALKELD, 142.

Debt upon bond, the defendant craved *oyer* of the condition, which was to pay £40 so long as the defendant should enjoy such an office, by quarterly payments every year; that he pleads that the office was granted to three for their lives, and that he enjoyed it as long as they lived, and so long he paid the said rent quarterly. The plaintiff replied that he (the defendant) enjoyed the office longer, and that he had not paid the money by quarterly payments; and upon demurrer to the replication, it was objected that it was double. *Sed per curiam*, it is not, for the defendant cannot in his rejoinder tender an issue upon payment of the money, because that would be a departure from his plea.

SAUNDERS *v.* CRAWLEY.

IN THE KING'S BENCH. 1614.

REPORTED 1 ROLLE, 112.

Saunders brought debt on an obligation for non-performance of articles which were to pay so much at two fixed days in equal portions, which the defendant says he paid accordingly. The plaintiff replies that he has not paid accordingly, which is double plea, *quod fuit concessum per curiam*, for this goes to both days.

HUMPHREYS *v.* BETHILY.

IN THE COMMON PLEAS. 1690.

REPORTED 2 VENTRIS, 198, 222.

In an action of debt upon a penal bill, where the defendant was to pay 10s. on the 11th of June, and 10s. more upon the 10th of July next following, and 10s. every three weeks after, till a certain sum were satisfied by such several payments. And for the true payment thereof the defendant obliged himself in the penal sum of £7.

The plaintiff *in facto dicit* pleaded, that the defendant did not pay the said sum, or any part thereof, upon the several days afore-said, *unde actio accrevit* for the £7.

The defendant pleaded that he paid 10s. upon the 11th of June, *et hoc paratus est verificare*, etc.



The plaintiff replied that he did not pay it, *et hoc petit quod inquiratur per patriam*. To which the defendant demurred.

The plea was held altogether insufficient.

But then Pollexfen, C. J., observed that the declaration was naught; for he should have declared that the defendant failed in payment of one of the sums, which would have been enough to have entitled him to the penalty; but he says, the said several sums of money, or any of them, and this is double; and he inclined that it was not aided by answering over, or by the general demurrer.

*Adjournatur.*

*Vide* Saunders and Crawley.

The court now delivered their opinions that the doubleness in the declaration was cured by answering, and no exception can be taken to it upon the general demurrer. Saunders and Crawley is the same with this.

*Judicium pro quer'.*

# JOHN RATHBONE v. SAMUEL RATHBONE.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1827.

REPORTED IN 5 PICKERING, 221.

Mere surplusage will not make a pleading double.

Debt. The defendant pleaded in abatement, that the writ, "at the time when it was put into the officer's hands for service, and at the time when it was served, by attaching the property of the said Samuel, contained no count or declaration; nor was there any cause of action in any way or manner set forth."

The plaintiff demurred because the plea was double, in averring that there was no count, etc., in the writ both at the time when it was put into the officer's hands and when it was served; also in averring that there was no count or declaration, nor any cause of action set forth in the writ.

Ashmun, for the plaintiff. A plea is double when either of two matters alleged is alone sufficient. Here, if the want of a declaration when the writ was served was fatal, the want of one when it was put into the officer's hands was likewise, and *vice versa*. Thayer v. Rogers. A plea is double when the other party cannot make one answer to it. Here there may have been a declaration when the writ was put into the officer's hands, and not when it was served; and *vice versa*. The plea alleges too that the writ contained no declaration or any cause of action. If these mean

the same thing, then the same defence is repeated; which informality is fatal to a plea in abatement. But they do not mean the same thing. A declaration is a formal statement of the cause of action. In assumpsit upon an account annexed, if the account is left out, there is a declaration, but no cause of action; and if the writ has only the account annexed, there is a cause of action but no declaration. The plea, therefore, is double.

Mills and Newcomb, on the same side.

Wells and Maxwell, for the defendant.

The opinion of the court was drawn up by

Parker, C. J. We consider the plea in abatement good, notwithstanding the causes assigned in support of the special demurrer. It is immaterial what the writ contained when it was first filled, provided it did not contain any cause of action when put into the hands of the officer to be served, and when actually served; for the question must always be, whether then when it was served it was a good writ, so as to hold the property attached. The allegation of there being no cause of action when it was put into the officer's hands for service, is surplusage and may be rejected; so that there is no duplicity.

### FISHER v. WREN.

IN THE COMMON PLEAS. 1688.

REPORTED 3 MODERN, 250.

Duplicity should be attacked by demurrer.

The plaintiff brought an action of trespass on the case, and declared that he was seised of an ancient messuage, and of a meadow, and an acre of land parcel of the demesnes of the manor of Crosthwait; and sets forth a custom to grant the same by copy of court roll; and that there are several freehold tenements parcel of said manor, and likewise several customary tenements parcel also thereof, grantable at the will of the lord; and that all the freeholders, etc., time out of mind, etc., together with the copyholders according to the custom of the said manor have enjoyed *solam et separalem pasturam* of the ground called Garths, parcel of the said manor, for their cattle *levant et couchant*, etc., and had liberty to cut the willows growing there for the mending of their houses; and the defendant put some cattle into the said ground called Garths, which did eat the willows, by reason whereof the plaintiff could have no benefit of them, etc. Upon not guilty pleaded, there was a verdict for the plaintiff.

Pemberton, Serjeant, now moved in arrest of judgment; and took these<sup>1</sup> exceptions.

First, as to the manner of the prescription which the plaintiff had laid to be in the freeholders, and then alleged a custom for the copyholders, etc., and so made a joint title in both, which cannot be done in the same declaration, because a prescription is always alledged to be in a person, and a custom must be limited to a place, and therefore an entire thing cannot be claimed both by a prescription and custom, because the grant to the freeholders and this usage amongst the copyholders could not begin together.

E. *contra* it was argued, That it cannot be denied, but that there may be a custom or prescription to have *solam et separalem pasturam*. But whether both prescription and custom can be joined together, is the doubt now before the court; and as to that he held it was well enough pleaded, for where there is an unusual right, there must be the like remedy to recover that right; it was thus pleaded in North's Case, 1 Saund. 347, 351; 1 Vent. 383.

But admitting it not to be well pleaded, it is then but a double plea, to which the plaintiff ought to have demurred; and this may serve for an answer to the first exceptions.

*Adjournatur.*

# READ v. MATTEUR.

IN THE KING'S BENCH. 1735.

REPORTED CASES TIME OF HARDWICKE, 286.

Trover against Christopher Matteur; defendant pleads in abatement that he is called John Mether, and by the same name and surname was always known and called, *absque hoc* that he is named by that name and surname of Christopher Matteur, or by the same name or surname was never known or called; to which plea plaintiff demurred.

Serjeant Hayward for the plaintiff, objects, 1st,<sup>2</sup> That this is a double plea because here are two matters put in issue, viz. Whether his christian name be John, and whether his surname be Mether.

Kyffin for defendant, The two names are but one description, and showing the whole name to be mistaken is but one fact put in issue.

Lord Hardwicke: I think the plea is well enough, and not double. It is an uncommon thing for plaintiff to mistake both

<sup>1</sup> The other exceptions and matter relating thereto, since not here relevant, are omitted.

<sup>2</sup> Matter relating to the second plea, since not here relevant, is omitted.

names of defendant, and therefore there may not be many precedents of such a plea, but when such a mistake is made, I do not see how the defendant can plead otherwise: and as the defendant is in plea in abatement to give the plaintiff a better writ, how could he do so in this case without showing what his real name is?

Judgment that the bill be abated.

### ARGUMENTATIVENESS.

“Every plea must be direct, and not by way of argument, or rehearsall.” Coke upon Littleton, 303 a.

### EXECUTORS OF GRENELIFE *v.* W—.

IN THE KING'S BENCH. 1538.

REPORTED 1 DYER, 42 a.

Argumentativeness defined.

The executors of one Grenelife brought debt on a bond made in August, and indorsed with this condition: “The condition, etc. That whereas the within bounden W. hath sold to the within named I. G. a certain meadow in D. the aforesaid W. shall warrant the said I. G. and save harmless against lord, and king, and all other, if that the said I. G. shall have and peaceably enjoy the said meadow, to him and to his heirs, to hold of the lord of W. Hall, by the service thereof, after the custom of the manor, that then, etc.” The defendant pleaded, that the said meadow was customary and parcel of the said manor of W. and demised, and demisable by copy, etc., and that there is a custom within the manor, that if the customary tenants fail in payment of their rents and services, or commit waste, then the lord for the time being may enter for forfeiture: and he said, that the said I. Grenelife took the said meadow by copy to him and his heirs, at a court holden in October next after the making of the bond; and showed the certainty, and who was steward; and he further said, that the said I. G. during all his life time had and peaceably enjoyed the meadow, and died seised thereof, by reason whereof the said meadow descended to one B. as son and heir, which son *de injuria sua propria* entered without the admission of the lord, against the custom of the said manor; and because three shillings of rent were in arrear on such a day, the lord entered the meadow, as into lands forfeited to him; whereof he prayed judgment, etc. And to this the plaintiff demurred. . . .

And Shelley compared the case to a Banbury cheese, which is

worth little in substance when the parings are cut off, for so this case is brief in substance, if the superfluous trifling which is on the pleadings be taken away; for the intention of the condition was, that the obligor should warrant and save harmless I. G. for the land sold, and that is the effect of the condition. And then there is nothing more to be seen but how the defendant hath performed such intention, when he pleads that I. G. had and peaceably enjoyed it all his life. And it appeared to him that this was not well pleaded, for it is only argument, s. if he has peaceably enjoyed the land; therefore he hath guaranteed and saved him harmless, but he thought this was not sufficiently pleaded, for divers cases are ruled in the books, that a man shall not plead by argument, but directly in fact. As if in trespass for carrying away goods, the defendant would plead that the plaintiff never had any goods, this is argumentative, that then the defendant is not guilty; and nevertheless it is no plea, and yet in that case the argument is infallible; therefore *a multo fortiori* in this case, here, where he pleads performance of the condition by a fallible argument, for although the obligee hath peaceably enjoyed, this may be, and yet he may have cause of warranty, and also so to be saved harmless; because if a man bring against him a plaint for the land, and he have cause to vouch, and the other be nonsuited or barred, so that the obligee continue his estate peaceably, yet the condition is broken, and the suing of an action is not tortious, nor *contra pacem*, and whatever is not forcible is peaceably done. (And he examined, and dwelt much upon that word peaceably.) And also it might be that I. G. forfeit issues to the king, whereof he is not saved harmless; and therefore this argument which is fallible is not well pleaded, wherefore, etc. But if he had alleged that I. G. was impleaded, and he guaranteed and defended him, where he paid the issues for him, that would have been good: or if he had said directly, that no man had brought an action against him, and that he was not damnified by the king, or any one else, etc. that would have been well pleaded; but as it now is pleaded, the plaintiff ought to recover. But Baldwin was of a contrary opinion; though neither I, nor any one else, I believe, understood his refutation.<sup>1</sup>

### REPUGNANCY.

“Repugnancy . . . as the term imports, is some contrariety or inconsistency between different allegations of the same party.” Gould on Pleading, 154.

<sup>1</sup> Matter not here relevant is omitted.

PALMER *v.* STAVELY.

IN THE KING'S BENCH. 1701.

REPORTED 1 SALKELD, 24.

*Indebitatus assumpsit* for money had and received by the defendant for the plaintiff *ad usum* of defendant, and verdict upon *non assumpsit* for the plaintiff. And, upon motion in arrest of judgment, the court held, that these words *ad usum* of the defendant, should be rejected, because they are insensible and repugnant, and then the promise was for money had and received by the defendant for the plaintiff, which is well.

HART *v.* LONGFIELD.

IN THE QUEEN'S BENCH. 1703.

REPORTED 7 MODERN, 148.

*Indebitatus assumpsit*. There were several counts in the declaration; and demurrers to some, and issues taken upon others.

One of the counts, to which there was a demurrer, was this: The plaintiff declared, that whereas such a day and year the defendant was indebted to him in such a sum for nourishing Edward Longfield, at the request and instance of the defendant, and that he, the defendant, promised to pay him. There was also a *quantum meruit* for nourishing the said Edward Longfield, for the same time.

The second exception<sup>1</sup> was, That the first declaration being an *indebitatus* for nourishing of Edward Longfield for such a time, there is likewise a *quantum meruit* for the same nourishing, and it is contradictory, that there should be one agreement to pay so much as it should be worth, and another to pay a sum uncertain, and both stand.

Holt, Chief Justice. These cannot be his agreements, and both stand for the same thing at the same time; for in such case, the last will destroy the first, and the last will only stand; but the way had been, to aver them to be different children; and that is the right way when a *quantum meruit* and *indebitatus* is brought for the same thing; for here you ought to multiply Edward Longfield as often as you multiply your declaration. . . . And the court directed the plaintiff to enter a *non pros.* upon all but the first, and take judgment upon that, and so it was done.

<sup>1</sup> Matter relating to the first exception is here omitted.

NEVIL *v.* SOPER.

IN THE KING'S BENCH. 1698.

REPORTED 1 SALKELD, 213.

In covenant against an apprentice the plaintiff assigned for breach, that the apprentice, before the time of his apprenticeship expired, & *durante tempore quo survivit* departed from his master's service. The defendant demurred, and had judgment, because the declaration was repugnant, for it should have been *durante tempore quo servire debuit*. The case of *Lawly v. Arnold*, Hill. 8 W. III. B. R. was not unlike this: That was trespass for taking and carrying away his timber and brick, *super terram suam jacent. ergo confectionem domus de novo ædificat*. And the court held this insensible, for they could not be materials towards the building of a house already built. *Sed quære*, If that was not surplusage?

WYAT *v.* ALAND.

IN THE QUEEN'S BENCH. 1703.

REPORTED 1 SALKELD, 324.

Surplusage when material.

An action *qui tam* was brought by an informer against one Aland for taking more than statute interest; and he declared, that the defendant Aland had lent to one Nicholson £200 for so long, and that at the day of payment it was corruptly agreed between them the said Aland and Nicholson, that the said Nicholson should give the said Aland £40 *pro deferendo & dando ulteriorem diem solutionis, viz. tiel jour prædicto Aland*; whereas Aland was not the person to pay, for it was he that lent the money; and it was objected that this was nonsensical and impossible, and that the statute of jeofails would not aid a penal information. The counsel of the other side urged, that the nonsense should be rejected, and then the declaration would be sufficient; and cited 1 Mod. 42; 2 Saund. 96; 2 Croke, 349, Hall and Bonithan. Holt, C. J. Where a matter set forth is grammatically right, but absurd in the sense and unintelligible, we cannot reject some words to make sense of the rest, but must take them as they are; for there is nothing so absurd or nonsensical, but what by rejecting and omitting may be made sense; but when a matter is nonsense by being contradictory and repugnant to somewhat precedent, there the precedent matter which is sense shall not be defeated by the repugnancy which follows, but that which is contradictory shall be rejected; as in

ejectment where the declaration is of a demise the second of January, and that the defendant *postea*, *scil.* the first of January ejected him ; Here the *scilicet* may be rejected, as being expressly contrary to the *postea* and the precedent matter.<sup>1</sup>

Powell, J., differed as to the first point, and was of opinion, that words unnecessary might in construction be omitted or rejected, though they are not repugnant or contradictory, but *in cæteris omnibus* agreed with the chief justice. *Adjournatur.*

<sup>1</sup> “ 2dly, he seemed to hold, that an information upon a penal statute by a common informer was not within the statute of jeofails, otherwise of an information by a party grieved. 3dly, he held that the word *dando* was applicable to Nicholson, and *solutio* to Alland ; so that it bore this meaning, viz. for giving a farther day to Nicholson of payment to Alland, since he was to receive, and the money was to be paid to him ; and where a matter is capable of different meanings, that shall be taken which shall support the declaration or agreement, and not the other, which would defeat it.” *Sed contra*, Co. Litt. 303 b.



## CHAPTER XI.

### MOTIONS BASED UPON THE PLEADINGS.

#### MOTION IN ARREST OF JUDGMENT.

“A MOTION in arrest of judgment is to be considered exactly the same as if the question had arisen on general demurrer.” Per Ellenborough, C. J., in *Bowdell v. Parsons*, 10 East, 359 [1808].

#### BROOKE *v.* BROOKE AND OTHERS.

IN THE KING'S BENCH. 1664.

REPORTED 1 SIDERFIN, 184.

Errors in substance may be cured by subsequent pleadings, so as to be good on motion in arrest.

In trespass for taking a hook, etc., the defendant pleaded that he had a way to such a wood across the land of the plaintiff, that he was passing there, and that the plaintiff endeavored to cut his harness and to wound him with the said hook, wherefore he took the said hook out of the hands of the plaintiff, and delivered it to the constable, etc. Issue upon the way, and verdict for the plaintiff. And it was moved, in arrest of judgment, that the plaintiff had not shown in his declaration that the hook was in his possession. And it was agreed by the court, that if the defendant had pleaded Not guilty, the judgment should be arrested, because the plaintiff does not say in his declaration *hamum suum*, nor show that it was in his possession. But in this case the court were of opinion that the defendant, by his special plea, made the declaration good, for the defendant pleads that he took the hook *extra possessionem* of the plaintiff, wherefore the plaintiff may well maintain this action on his possession without any property.<sup>1</sup>

<sup>1</sup> *Drake v. Corderoy*, Cro. Car. 288; *Osborne v. Brooke*, Aleyn, 7; *Slack v. Lyon*, 9 Pick. 62; *Vaughan v. Havens*, 8 Johns. 110 (*semble*), *accord.*; *Badcock v. Atkins*, Cro. El. 416; *Pelton v. Ward*, 3 Caines, R. 73, *contra*. See *Willion v. Berkeley*, Plowd. 230; *Wright v. Goddard*, 8 A. & E. 144; *Butt's Case*, 7 Co. 24.

**BARRET v. FLETCHER.**

IN THE KING'S BENCH. 1609.

REPORTED IN CROKE'S JAMES, 220.

As a general rule, errors in form are no ground for arresting judgment.

Debt, upon an obligation of five hundred pounds, conditioned to stand to the award of J. S. and T. D., so that, etc.

The defendant pleaded, that the arbitrators did not make any award.

The plaintiff replies, and shows the award, but assigns no breach.

The defendant rejoins, that the award pleaded is not the arbitrator's award; whereupon, issue being joined, a verdict was given for the plaintiff.

It was moved in arrest of judgment, because the plaintiff in his replication not having assigned any breach of the award, there was not cause of action; for the obligation is not for debt, but is guided by the condition, which is for the forbearance of a collateral thing, and the court ought to be satisfied that the plaintiff had good cause of action, otherwise they cannot give judgment; for although a verdict be given for the plaintiff, yet this defect in the replication is matter of substance, and is not helped by the statute.

The court being of that opinion, judgment was stayed.

**SLACK v. LYON AND ANOTHER.**

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1829.

REPORTED IN 9 PICKERING, 61.

Errors in substance, if cured, may not be reached by motion in arrest.

This was a complaint under the statute, in order to obtain damages for overflowing the complainant's land. His complaint alleged, that the defendants "have maintained and kept up a dam across Charles River for six years last past, and still do maintain and keep up said dam, whereby the lands" of the petitioner, since May 25, 1825, "have been overflowed and greatly damaged."

The respondents pleaded, that a jury ought not to be impanelled to appraise the yearly damage, because they are seised and in the possession and occupation of certain mills on and below the dam, and by reason of such seisin, possession, and occupation by them and those whose estate they have, they, for all the time mentioned in the complaint, had, and still have a right, by means of the dam, to raise the water as high as it has been raised by this means

during the time mentioned in the complaint, without paying damage.

The replication denied the right of the respondents to raise the water as high as it had been raised, without paying damage. Issue was thereupon joined, and a verdict found for the complainant. The respondents then moved in arrest of judgment, because the complaint did not allege that the dam was erected and kept up, and the water raised for the purpose of working or turning any water-mills, or that there were any mills on, below, or connected with the dam, by means of which the complainant's land was overflowed.

Richardson and Cushing, in support of the motion, contended that the defect in the complaint was one of substance, and that it was not cured by the verdict or by the respondents' pleading over. They cited *St. 1795, c. 74*; *Kingsley v. Bill*, 9 Mass. R. 198; *Stilson v. Tobey*, 2 Mass. R. 521; *Avery v. Tyringham*, 3 Mass. R. 160; *Wells v. Prince*, 4 Mass. R. 64; *Fuller v. Holden*, 4 Mass. R. 498; *Spear v. Bicknell*, 5 Mass. R. 132; *Cutler v. Southern*, 1 Lev. 194; *Badcock v. Atkins*, Cro. Eliz. 416; *Pelton v. Ward*, 3 Caines, R. 73; 2 Chitty, Pl. 424, n. 1; *Bonham's Case*, 8 Co. 120; *Elwis v. Lombe*, 6 Mod. 119; *Rigeway's Case*, 3 Co. 52; *Butt's Case*, 7 Co. 25.

Metcalf, for the complainant, admitted that the defect in the complaint was not cured by the verdict, but insisted that it was cured by the plea in bar. The old rule in Co. Lit. 303 b, that when a count is defective "by omission of some circumstance, as time, place, etc., there it may be made good by the plea of the adverse party, but if it be insufficient in matter, it cannot be salved," meant only that matters of form, but not of substance, are waived by mere pleading over. *Anon.*, 2 Salk. 519; *Dunning v. Owen*, 14 Mass. R. 162. But, however this may be, the weight of authority, as well as the better reason, is, that an express admission in a plea, of a material fact omitted in the count, supplies the defect. The cases of *Drake v. Corderoy*, Cro. Car. 288, and *Osborne v. Brooke*, Aleyn, 7, have overruled *Badcock v. Atkins*, cited on the other side. The approbation by Spencer, J. (in 3 Caines), of the latter case, was retracted in *Vaughan v. Havens*, 8 Johns. R. 84, and the authority of *Drake v. Corderoy* recognized. Metcalf also cited *Brooke v. Brooke*, 1 Sid. 184; *Zerger v. Sailer*, 6 Binn. 24; *Stephen*, Pl. 165; *Gelston v. Hoyt*, 13 Johns. R. 578.

Parker, C. J., delivered the opinion of the court. No doubt the complaint is insufficient, as it does not bring the case within the statute; but the defect is cured by the plea. The plea sets forth

the purposes for which the water was raised, bringing the case within the statute. The merits of the question have been tried, and the respondent ought not to be allowed to go back to a fault which he ought to have discovered at the beginning, unless the law clearly requires it.

The authorities are contradictory; some maintaining that a count defective in substance cannot be cured by pleading over; others the contrary. We are at liberty to follow those which seem to be founded on the better reason. Two of the old cases very decidedly maintain the affirmative; that in *Cro. Car.* 288, where a count for slander, defective in substance, was cured by the defendant's plea, and the case in *Siderfin*. In this last case the plaintiff counted against the defendant in trespass, alleging that he had taken his hook. The defendant pleaded, that the plaintiff being about to strike him with the hook, he took it out of his hands in order to deliver it to a constable. It was moved in arrest, for that the plaintiff had not averred that the hook was in his possession. The court said, had the defendant pleaded the general issue, the plaintiff could not have had judgment; but having shown that he took the hook out of the possession of the plaintiff, he had thereby cured the defect in the count. These two cases do not appear to have been overruled in England; on the contrary, they are cited in the digests and text-books without disapprobation, down to the recent work on pleading by Stephen.

In New York, however, a contrary doctrine was held, it being laid down in the case in 3 *Caines*, that a count defective in substance can in no case be cured by the defendant's plea; and the case of *Drake v. Corderoy* passed in review before the court. But in a later case, in 8 *Johns. Rep.*, the case of *Drake v. Corderoy* is distinctly put to the court, and Spencer, J., who delivered the opinion, expressly admitted its authority.

The way then is open to us to adopt the more reasonable doctrine, which we think is, that when the defendant chooses to understand the plaintiff's count to contain all the facts essential to his liability, and in his plea sets out and answers those which have been omitted in the count, so that the parties go to trial upon a full knowledge of the charge, and the record contains enough to show the court that all the material facts were in issue, the defendant shall not tread back and trip up the heels of the plaintiff on a defect which he would seem thus purposely to have omitted to notice in the outset of the controversy.

One of the counsel for the defendant has attempted to show that the defects in the two cases above cited, which were allowed to be

cured by the plea, were in form only; but in the case of the hook, the court go upon the ground that it was substance; and the case shows that it was. And so was the other case, of *Drake v. Corde-roy*. The counsel have ingeniously attempted to escape from those cases, by showing that the defects were only in particularity of the averment; but the particulars left out were essential to the averment, so that it was substantially defective.

Motion in arrest overruled.

## MOTION FOR A REPLEADER.

### WITTS *v.* POLEHAMPTON.

IN THE KING'S BENCH. 1698.

REPORTED 3 SALKELD, 305.

Per Holt, C. J. Where the plea of the defendant confesses the duty for which the plaintiff declared, but doth not sufficiently avoid it, and thereupon issue is joined on an immaterial thing, if it is found for the plaintiff, he shall have judgment, though the issue was immaterial; but where the defendant's plea avoids the plaintiff's duty, who replies and traverses a matter not material, and issue is taken upon such immaterial traverse, and it is found for him, the statute of jeofails will not help in such case; but there must be a replader.

### STAPLE *v.* HEYDON.

IN THE QUEEN'S BENCH. 1703.

REPORTED 6 MODERN REPORTS, 1.

The characteristics of repladers stated.

The plaintiff, Staple, brings trespass against John Heydon and George Fowler, for that they, on the thirty-first day of May, in the thirteenth year of the late King William, broke his close, called "the wharf," in Stepney, in Middlesex, and threw down a perch of rails therein standing; and also, for that, on the seventh day of July following, they entered into the same wharf, and committed the like trespass.

The defendant, George Fowler, as to all, pleads not guilty.

But John Heydon, as to the trespass laid on the thirty-first of May, pleads not guilty as to the force, and justifies the entry, and throwing down the rails, for that long before one Edward Gray was possessed by virtue of a certain lease for eighty years, then to come, and yet unexpired, of the said wharf, and also of a yard next ad-

joining thereunto; and that, for the necessary use of the said yard, he had and used a way over the said wharf to certain stairs on the river Thames, which was thereunto contiguous, there to take water, etc.; and that being so possessed, he, on such a day and year, which was prior to the time laid in the trespass, demised the said yard, *inter alia*, to the defendant, John Heydon, for a term of years yet unexpired, with all lawful ways, etc., thereunto belonging; by virtue whereof he entered, and was possessed, etc., whereby he was entitled to the said way; that the plaintiff obstructed it with rails, so that he, coming to use it, could not pass; and that he requested the plaintiff to open the rails, which he refused; so he justified the throwing them down. He pleaded directly in the same manner to the other trespass laid on the seventh of July; and avers that, at the several times, he had no other way to the said stairs and river Thames than by and through the said wharf.

The plaintiff, as to the plea to the first trespass, replies, that the defendant, John Heydon, had another convenient way to the river Thames than through the said wharf, and thereupon they were at issue; and upon the plea to the trespass on the seventh of July he demurs; "therefore let a jury come to try the issues, and assess contingent damages upon the demurrer."

Both defendants made default at *nisi prius*; which, being recorded, the inquest is awarded by default, and G. Fowler is found guilty of the trespass on the thirty-first of May, but acquitted of that on the seventh of July; and John Heydon is acquitted of the trespass on the thirty-first of May, as to the force, but the jury found, as to the rest, that he had no other way to the said stairs and river Thames than through the said wharf; and assess damages upon the demurrer, and acquit him of the trespass on the seventh of July.

In this case several points were moved and resolved by the court.

The first question was, whether a replender should be in this case, there being, as was said, an immaterial issue joined. And the court held clearly the issue was impertinent.

But as to replenders in general, the court held, —

First, That a replender is to be awarded when such an issue is joined, as the court after trial thereof cannot give a judgment, as being impertinent or uncertain, and not determining the right.

Secondly, That before the statute of jeofails, if such an issue were joined, the court before trial might award a replender.

Thirdly, When a replender is awarded, the amendment must begin where the plea, which makes the issue bad, begins to be faulty; and therefore if one make himself a bad title to his decla-

ration, to which there is a bad bar, and thereupon a bad replication, on which there is issue, there the replader must be awarded and entered on record; and the plaintiff shall declare *de novo*, etc. But if the bar be good, or the plea be good, and the replication bad, and issue thereupon, there a replader will be only as to replication; but if bar and replication be both bad, and a replader is awarded, it must be as to both.

Fourthly, If the court award a replader where it ought not to have been, or deny it when it ought to be, it is error.

Fifthly, That upon the award of a replader, there must be no costs, because it is a judgment of the court upon the pleading; but upon amendment of a plea in paper, there must be costs.

Sixthly, That upon a general rule for replader, without any direction from the court from what they should begin the replader, it must begin from the first fault which occasioned the bad pleading commenced; for the judgment is, *quod partes replacitent*.

Seventhly, That the pleadings in this case were such as a replader would be awarded upon at the common law; for the defendant having insisted upon a title to a way by grant, his averment that he had no other way was immaterial, and by consequence the issue thereupon impertinent; besides, there was no issue at all joined, for the plaintiff's affirmative does not meet with the defendant's negative.

Eighthly, That though a replader should have been at common law in this case, this motion having been made before trial, and it being doubtful whether a verdict would not help it by the statute of jeofails, the court said it would be just in them not to grant a replader till after verdict; for they said they might indeed grant a replader before verdict at common law, but they were not bound to do it.

So note the diversity since the statute; for though it were reasonable to award a replader before verdict at common law, where the pleading appeared such on which no judgment could be after verdict; yet since the statute, when a verdict may cure immaterial or informal issues, it may not be proper to do it.

Ninthly, After the trial the court held that this issue was such on which no judgment could be; for the defendant pleaded that he had no other way to the stairs and river Thames; the plaintiff replies that he had another way to the Thames; and the jury found no other way to the said stairs and river Thames; so in truth there was no issue joined.

Tenthly, That in this case there could be no replader, for the parties were quite out of court by the default.

READ *v.* DAWSON.

IN THE COMMON PLEAS. 1676.

REPORTED 2 MODERN, 139.

Debt upon bond against the defendant as executor: issue was joined whether the defendant had assets or not on the thirtieth day of November, which was the day on which he had the first notice of the plaintiff's original writ; and it was found for the defendant, that then he had not assets.

It was moved for a repleader, because it was said that this was an immaterial issue; for though he had not assets then, yet if he had any afterwards he is liable to the plaintiff's action.

But Barrell, Serjeant, moved for judgment upon this verdict, by reason of the statute of 32 Hen. VIII. c. 30, which helps in cases of mispleading or insufficient pleading. It is true, there are many cases which after verdict are not aided by this statute, as, etc.<sup>1</sup> . . . If the plea on which the issue is joined, hath no colorable pretence in it to bar the plaintiff, or if it be against an express rule in the law, there the issue is immaterial, and so as if there were no issue; and therefore it is not aided by the statute; but if it hath the countenance of a legal plea, though it wants necessary matter to make it sufficient, there shall be no repleader, because it is helped after verdict. Here the parties only doubt whether there were assets at the time of the notice, and it is found there were none. And so judgment was to be given accordingly.

The whole court was of that opinion.

But Atkins, Justice, was clear, that if the parties join in an immaterial issue there shall be no repleader, because it is helped after verdict by these words in the statute, viz. "any issue;" it is not said an issue joined upon a material point; and the intent of the statute was to prevent repleaders; and that if any other construction should be made of that act, he was of opinion that the judges sat there not to expound but to make a law; for by such an interpretation much of the benefit intended by the act to the party who had a verdict, would be restrained.

The other justices were all of opinion, that since the making of this statute it had been always allowed, and taken as a difference, that when the issue was perfectly material there should be no repleader; but that it was otherwise where the issue was not material.

And Scroggs, Justice, asked merrily, if debt be brought upon a

<sup>1</sup> A part of the argument is omitted.



bond, and the defendant plead that Robin Hood dwelt in a wood, and the plaintiff join issue that he did not, this is an immaterial issue, and shall there not be a repleader in such case after verdict? *Ad quod non fuit responsum.*

### NON OBSTANTE VEREDICTO.

“Where a plea confesses the action, and does not sufficiently avoid it, judgment shall be given on the confession, without regard to a verdict for the defendant, which is called a judgment *non obstante veredicto*; and in such case, a writ of inquiry shall issue.” Tidd’s Practice, 828.

“The distinction between a repleader and a judgment *non obstante veredicto* seems to be this: that when the plea is good in form, though not in fact, or in other words, if it contain a defective title, or ground of defence, by which it is apparent to the court, upon the defendant’s own showing, that in any way of putting it, he can have no merits, and the issue joined thereon be found for him, there, as the awarding of a repleader could not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*; but where the defect is not so much in the title, as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or defendant, there, for their own sake, they will award a repleader. A judgment, therefore, *non obstante veredicto*, is always upon the merits; a repleader, upon the form and manner of pleading.” Tidd’s Practice, 830.

### LACY v. REYNOLDS.

IN THE QUEEN’S BENCH. 1591.

REPORTED IN CROKE’S ELIZABETH, 214.

Action for words, which were, “He is as very a thief as any is in Warwick goal;” and avers that J. S. was then a prisoner in Warwick jail, condemned for horse-stealing; and it was clearly held that for these words action did lie, with this averment, but not otherwise.

After verdict, this matter was alleged in arrest of judgment, that the defendant did plead the bar, *quod quidam ignotus* came to Warwick, and there cut the purse of J. N., and the plaintiff, *sciens* this, him did receive and comfort, and by reason of it spoke the words. The plaintiff replied *de injuria sua propria*; and upon

this, issue was joined, and found for the plaintiff. It was alleged that the issue is ill joined, for this matter doth not prove the plaintiff a thief, although it doth prove him a felon. The court held that the issue was not well joined; but they conceived that, inasmuch as he had by this confessed the words, although the issue is mis-joined, and a mis-trial, yet this is as void, and the court shall give judgment upon his confession; and the plaintiff shall not have his damages taxed by the court, but shall have a new writ to inquire of damages. And it was so adjudged. *Vide* 22 Edw. IV. pl. 46.

LAMBERT *v.* TAYLOR AND ANOTHER, EXECUTORS OF  
GEORGE RENTON, DECEASED.

IN THE KING'S BENCH. 1825.

REPORTED IN 4 BARNEWALL & CRESSWELL, 138.

Motion *non obstante veredicto* proper where defendant confesses and fails to avoid.

Declaration<sup>1</sup> stated George Renton, on the 12th day of May, 1813, at, etc., made his promissory note in writing for £200, and delivered the same to J. Y., whereby, etc. It then averred the death of G. R. without payment of the note; that on the 11th of November, 1818, it was found that J. Y. was a *felo de se*, whereby the said note was forfeited to the late king; that on the 23d day of November, 1821, his present Majesty gave by his warrant the said note to J. Lambert, the plaintiff, etc. Breach, non-payment by Renton in his lifetime, or by the defendants, his executors. Plea, first, non-assumpsit by G. Renton, and issue thereon. Secondly, that the supposed promissory note in the declaration mentioned became due and payable to J. Younghusband in his lifetime, and that the supposed causes of action in the declaration mentioned did not accrue to the said J. Younghusband at any time within six years next before the exhibiting of the plaintiff's bill; upon which plea issue was taken in the replication. Thirdly, that there was not any such record of the said supposed inquisition before the aforesaid coroner as the said plaintiff had in his declaration alleged. To which plea the plaintiff replied, that there was such a record; and issue was joined upon the record, which record was produced to the court, and that issue found for the plaintiff. Lastly, the defendants pleaded that his Majesty did not make any such gift or grant unto the plaintiff as the plaintiff had in his declaration alleged; and

<sup>1</sup> The statement of the declaration is abbreviated as in Ames' Cases on Pleading, and only so much of the case is given as relates to the propriety of the motion for judgment *non obstante veredicto*.

upon that plea issue was joined. At the trial, before Bayley, J., at the Northumberland Summer Assizes, 1823, the jury found a verdict for the plaintiff on the first and last issues, with £250 damages. Upon the second issue, namely, the Statute of Limitations, the jury found a verdict for the defendants.

A motion was made in this court on the part of the plaintiff to enter up judgment for him *non obstante veredicto* on the second issue.

Tindal, for the plaintiff.

Cross, Serjt., *contra*.

Tindal, in reply.

Abbott, C. J., now delivered the judgment of the court, and after stating the facts of the case, proceeded as follows: In the present case the plea does not show that Younghusband was barred by the statute at the time of his death; and if he was not so barred, then a right vested in the crown and the rights of the crown are not barred or affected by the statute. The crown is not within the operation of the statute.

The plea then being bad, the defendant certainly cannot have judgment, although the issue is found for him, the issue being taken on an immaterial matter. And the question whether the plaintiff can have judgment, or whether there ought to be a repleader, depends upon the question whether the plea does or does not contain a confession of a cause of action; if a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment, notwithstanding the verdict. If the plea does not confess a cause of action, there must be a repleader; *Pitts v. Polehampton*. Now, admitting that a plea of *actio non accrevit infra sex annos* as generally pleaded does not admit that any cause of action did at any time accrue, yet this plea does not contain that matter alone, but it contains an assertion that the note became due and payable to Younghusband in his lifetime. This is an acknowledgment that Younghusband had at one time a good cause of action; and if he had a cause of action, the right to sue would upon the facts alleged in this declaration pass to the crown, and from the crown to the plaintiff, unless the defendant has alleged some matter of fact sufficient in law to show that such right did not so pass, or, in other words, unless the matter of fact pleaded in bar be a good bar in law to the action. I have already said that we think it is not a good bar; and then a cause of action being confessed and not well avoided, the plaintiff is entitled to judgment.

The rule, therefore, will be that judgment be entered for the plaintiff, *non obstante veredicto*. Judgment for plaintiff.

COULING *v.* COXE.

IN THE COMMON PLEAS. 1848.

REPORTED 6 DOWLING &amp; LOWNDES, 399.

*Non obstante veredicto* distinguished from repleader.

Case against a witness for disobedience to a *subpœna*. The declaration, after alleging that the plaintiff had sued one Thomas Foulkes in an action of trespass, and that certain issues, before then joined in that suit, came on to be tried at Kingston, stated the issuing and service on the defendant of a writ of *subpœna* on behalf of the plaintiff. The declaration then averred that the plaintiff had a good cause of action in the said suit, and that the appearance and testimony of the now defendant, in obedience to the writ of *subpœna*, were necessary and material to the trial of the said issues. Breach, that the now defendant, without lawful excuse, neglected to appear and give evidence, by reason whereof the plaintiff was obliged to withdraw the record, and was compelled to pay certain costs to the said Foulkes, and lost the benefit of certain costs which he, the plaintiff, had incurred in proceeding to the trial of the said issues.

Pleas: first, not guilty; secondly, thirdly, fourthly, fifthly, sixthly, and seventhly, traverses of material allegations in the declaration; eighthly, that the plaintiff had not a good cause of action, *modo et forma*; ninthly, that the testimony of the defendant was not material to the trial of the issues; and tenthly, leave and license. Issues thereon.

Upon the trial before Parke, B., at the Guildford Summer Assizes, 1846, the jury found for the plaintiff upon all the issues except the eighth; and upon that issue they found for the defendant.

Lush having, in the following term, obtained a rule *nisi* on the part of the plaintiff to set aside the verdict upon the eighth plea, and for a repleader, or to enter up judgment for the plaintiff *non obstante veredicto*.<sup>1</sup>

Pearson showed cause.

The plaintiff is not entitled to judgment *non obstante veredicto*, for the eighth plea is not in confession and avoidance; *Atkinson v. Davies*; *Gwynne v. Burnell*. The court will only grant a repleader. [He referred to *Gordon v. Ellis*.]

Lush, *contra*.

<sup>1</sup> Only so much of the case is given as relates to the propriety of the motion for judgment *non obstante veredicto*. The abstract is that of J. B. Ames in his *Cases on Pleading*.

If the rule laid down in *Gwynne v. Burnell* be of universal application, it is admitted that the plaintiff is not entitled to judgment *non obstante veredicto*, but that a repleader will be awarded; because the plea upon which the issue has been found against the plaintiff is a traverse, and not in confession and avoidance. The allegation, however, which that plea traversed, was, it is submitted, immaterial, and its omission would not only not have made the declaration bad, but it would not even have effected the amount of damages to be recovered; for it was immaterial, as regards the question of damages, whether the defendant's evidence was necessary upon one, or upon all, the issues, his absence being the cause why all of them remained untried. If the ninth plea had traversed that the defendant's evidence was material upon all the issues, it would have been bad. If, therefore, the allegation traversed by the eighth plea was immaterial, and might have been struck out altogether, it is submitted that a repleader would be useless, and that the court will give judgment for the plaintiff *non obstante veredicto*; because, besides this immaterial issue, which was found for the defendant, there are others which are material and decisive of the whole cause of action which have been found for the plaintiff; *Negelen v. Mitchell*. [Cresswell, J., referred to 2 Wms. Saund. 319 *e*, n. (*h*), 6th edit.]

Wilde, C. J., now delivered the judgment of the court.

The second question is, what judgment should be given on this record, taking the eighth plea to be bad? Before the statute of Anne, the question whether there should be a repleader or judgment *non obstante veredicto* depended on whether the plea, on which the immaterial issue arises, admits a cause of action by way of confession and avoidance. But since that statute, it has been held that, although the plea, on which the immaterial issue was found for the defendant, did not confess the cause of action, if it was confessed or proved on the other pleas which were found for the defendant, there should be no repleader, but judgment for the plaintiff. And even although the pleas on which the good issues have been taken and found for the plaintiff, were not pleas in confession and avoidance, but traverses of material allegations in the declaration, and although some of the material allegations were neither traversed nor proved, nor admitted by way of confession and avoidance, it has been held that where the other material pleas enabled the court to give judgment, without requiring the parties to replead, in order to show on which side the right was, there should be no repleader, but judgment *non obstante veredicto*. Indeed, a plea traversing an allegation in a declaration, although not for all purposes, nor in all events, an admission of the material allegations in the declaration

which it does not traverse, yet may be considered as a conditional admission, that is, as admitting the allegation not traversed, in case the plaintiff can prove the allegation traversed; and it is certainly so treated in the case in which, on a single plea traversing a part of the declaration, where an issue is found for the plaintiff, the plaintiff has judgment; which he could not be entitled to, unless the court considered the material allegations which were not traversed, as being admitted; and the same consequence follows if several material traverses are all found for the plaintiff. In the present case, several traverses on material allegations of the declaration are found for the plaintiff, who has also obtained a verdict on the plea of leave and license, which is a plea in confession and avoidance; and the only issue found for the defendant does not show that the plaintiff has no cause of action. So that the court, therefore, have no difficulty in saying that the plaintiff, and not the defendant, is entitled to judgment, and have no reason to award a repleader to discover which is right. The rule, therefore, to enter judgment for the plaintiff on the eighth plea, *non obstante veredicto*, must be made absolute.

Rule absolute.

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